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Constitutional Law - Due Process - Automatic and Permanent Dismissal of Public School Teachers for Invoking the Privilege Against Self-Incrimination

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RECENT DECISIONS

CONSTITUTIONAL LAW — Due Process — AUTOMATIC AND PERMANENT DISMISSAL OF PUBLIC SCHOOL TEACHERS FOR INVOKING THE PRIVILEGE AGAINST SELF-INCRIMINATION—Petitioners, employed as public school teachers in New York City, were subpoenaed to appear before a Senate Internal Security Subcommittee. When questioned by the committee about communist activities, petitioners asserted the constitutional privilege against self-incrimination. Pursuant to the New York City Charter,[1] they were summarily dismissed and permanently barred from re-employment by the city. No hearing was required nor given prior to the dismissal. There was no evidence of conduct otherwise warranting a dismissal. In an action for reinstatement, *held,* dismissal affirmed. *Daniman v. Board of Education of City of New York,* 306 N.Y. 532, 119 N.E. (2d) 373, 307 N.Y. 806, 121 N.E. (2d) 629 (1954), probable jurisdiction noted sub nom. *Slochower v. Board of Higher Education,* 348 U.S. 935, 75 S.Ct. 356 (1955).

Recent affirmations of dismissals under similar circumstances[2] sustain the principle that public employees have no vested property right, nor other constitutional right, to retain the "privilege" of public employment.[3] The proprietary rights inherent in the field of public employment enable states to act, in effect, like private employers in determining policies and conditions for employment.[4] The only limitation placed on this power is that the state action cannot be arbitrary.[5] Does the charter provision in the principal case meet this minimum standard of due process? It can be construed to require either (1) that a conclusive presumption of unfitness be drawn from a refusal to testify, or (2) that the employee testify as a condition of retaining his public employment. If the petitioners had admitted actual membership in a proscribed organization, this would not have created a conclusive presumption of unfitness under New York's Feinberg Law[6] since the fact of membership creates only prima facie evidence of unfitness, rebuttable at a hearing required by that statute.[7]

1 "If any . . . employee . . . having appeared [before any legislative committee] shall refuse . . . to answer any question . . . on the ground that his answer would tend to incriminate him, . . . his . . . employment shall terminate . . . and he shall not be eligible . . . to any office or employment under the city. . . ." N.Y. City Charter (Tanzer, 1937) §903.

2 Faxon v. School Committee, (Mass. 1954) 120 N.E. (2d) 772; Board of Education v. Wilkinson, 125 Cal. App. (2d) 100, 270 P. (2d) 82 (1954); Board of Education v. Eisenberg, (Cal. App. 1954) 277 P. (2d) 943 (reasons for refusing to testify held immaterial).

3 Christal v. Police Commission, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939); McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927). *Contra,* Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923).

4 E.g., Crane v. New York, 239 U.S. 195, 36 S.Ct. 85 (1915).

5 But see Byse, "Teachers and the Fifth Amendment," 102 UNIV. PA. L. REV. 871 (1954).

6 16 N.Y. Consol. Laws (McKinney, 1953) §3022.

7 These factors were held to satisfy the requirements of due process in Adler v. Board of Education, 342 U.S. 485 at 495-496, 72 S.Ct. 380 (1952).

While the charter in the principal case is not expressly framed in terms of presumptions, in practical operation it authorizes a conclusive presumption of unfitness to be inferred from a refusal to testify.[8] Conclusive presumptions which preclude the affected party from presenting evidence in his own defense have frequently been struck down as arbitrary in nature.[9]

In addition, the terms of the charter in the principal case condition the grant of the privilege of public employment upon the surrender by the employee of his constitutional privilege. The doctrine of unconstitutional conditions has not, however, prevented states from imposing on the privilege of public employment conditions which would be invalid in other contexts.[10] But such conditions may restrict only those constitutional rights which, when exercised, conflict with the duties of public employment.[11] Control over public employment includes not only the right to dismiss disloyal employees, but also the right to prescribe that certain acts by the employee shall be considered, as a matter of policy, a sufficient indication of disloyalty to justify dismissal. Thus, *Garner v. Board of Public Works*[12] upheld an ordinance which required the dismissal, on loyalty grounds, of any employee who refused to execute an affidavit respecting affiliation with the Communist Party. A city should also be able to prescribe that the assertion of the privilege before a committee is sufficient indication of disloyalty to warrant dismissal. The essential distinction between the *Garner* case and the principal case, however, is that the dismissed employee in the *Garner* case could later execute the affidavit and be re-employed. A dismissal, when accompanied by a denial of re-employment for years or for life, has been condemned as "punishment, and of a most severe type."[13] *Wieman v. Updegraff*,[14] although decided on the

[8] A statute operating in a similar way was held invalid in Matter of Peck v. Cargill, 167 N.Y. 391, 60 N.E. 775 (1901).

[9] Mobile, J. & K. C. R. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136 (1910); Manley v. Georgia, 279 U.S. 1, 49 S.Ct. 215 (1929); Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215 (1952).

[10] Houghton v. School Committee, 306 Mass. 542, 28 N.E. (2d) 1001 (1940); Joyce v. Board of Education, 325 Ill. App. 543, 60 N.E. (2d) 431 (1945); School City of East Chicago v. Sigler, 219 Ind. 9, 36 N.E. (2d) 760 (1941). By rejecting both the unions' contention of unconstitutional condition and the government's contention of mere "privilege," the Douds case may indicate that this doctrine is inapplicable to regulations under a separate power (e.g., interstate commerce or public employment) as opposed to regulations by authority of the police power. American Communications Assn. v. Douds, 339 U.S. 382 at 389-390, 70 S.Ct. 674 (1950).

[11] A police officer's refusal to answer is inconsistent with his duty to detect and prevent crime. In Faxon v. School Committee, note 2 supra, the court found a similar inconsistency between the teacher's duty in the public school system and his refusal to answer questions concerning communism.

[12] 341 U.S. 716, 71 S.Ct. 909 (1951).

[13] United States v. Lovett, 328 U.S. 303 at 316, 66 S.Ct. 1073 (1946). In Bailey v. Richardson, (D.C. Cir. 1950) 182 F. (2d) 46, affd. by an equally divided court, 341 U.S. 918, 71 S.Ct. 669 (1951), proscription of a dismissed employee from re-employment for three years was held void. The three year bar was an individual judgment in this case.

narrower issue of indiscriminate classification of innocent with knowing activity, did indicate that there are constitutional rights which will protect the public from employee arbitrary dismissal.[15] Although the city may properly dismiss an employee who refuses to make the required disclosures, provisions which create a conclusive presumption of unfitness and which permanently bar the employee from public employment are open to attack as an arbitrary exercise of power and hence invalid as a denial of due process.

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The court indicated that the order might have been valid had it been a general order covering all cases.

[14] Note 9 supra, at 191, 192.

[15] See also Alston v. School Board, (4th Cir. 1940) 112 F. (2d) 992, in which such a constitutional right was protected in spite of the contention that public employment is only a privilege.