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OPINION NO. 85-229

December 30, 1985

Honorable Joseph K. Mahony, II
State Representative
406 Armstrong Building
El Dorado, AR 71730

Dear Representative Mahony:

You have requested an opinion from our office on the following questions:

1. Can a State employee have such an expectancy in the continuation of his employment that he can be said to have a property right in that employment?
2. If an employee has a property right in his job, can he be terminated without due process of law?
3. Does an individual's right to "due process" include the right to request an evidentiary hearing?
4. Does an individual's right to "due process" ever include the right to request a closed evidentiary hearing?
5. If there is a conflict between a state statute and the Federal Constitution, which controls?

In addition to a specific response to each of the questions you have raised, a copy of a recent opinion prepared for State Representative Doug Wood is being enclosed for your information.

In response to your first question concerning whether or not the expectation of continued employment creates a property right in that employment, there is unfortunately not a clear-cut answer. Until recently the Courts have viewed employment by a State agency to be an employment-at-will situation. That is, absent a term certain contract of employment there was no expectation of continued employment in State service. Without that expectation there could be

no property interest in State employment. However, recently the United States District Court for the Western District of Arkansas held that an internal grievance procedure using the terms ". . . [an employee]" who feels he/she has been terminated unfairly will have the right to appeal, under the following formal procedure." . . . in the Court's view, [this provision of the policy] provided the employees of that department with the sufficient expectancy of continued employment to require that a due process hearing be held before termination." Hogue v. Clinton, et. al., 605 Fed. Supp. 1288, 1297 (W.D. Ark. 1985). This is contra to the holding of the United States District Court for the Eastern District of Arkansas in other cases. Therefore, until this split between our district courts is resolved, each case should be individually evaluated. Hogue is currently on appeal to the United States Court of Appeals for the Eighth Circuit.

In response to your second question the answer is no. If an employee has a recognized property right in his or her job then to terminate that employee without due process would be impermissible.

In response to your third question, the essence of "due process" in this context is the provision of a meaningful hearing at a meaningful point in time. Though there are no set procedures through which this must be accomplished, the United States Supreme Court has recognized the need for four(4) basic elements. Those elements are: (1) adequate notice, Goss v. Lopez, 419 U.S. 565 (1975); (2) adequate opportunity for a hearing, Armstrong v. Mango, 380 U.S. 545 (1965); (3) the right to introduce evidence, Baltimore and Ohio Road Company v. U.S., 298 U.S. 349 (1936); (4) and finally, the right to confront and cross examine witnesses, Wolf v. McDonnell, 418 U.S. 539 (1974), but see generally, Payne v. Ballard, et. al., 595 F.Supp. 878 (E.D. 1984).

Under the holding of Baltimore and Ohio Railroad Company v. U.S., supra, the right to introduce evidence clearly exists. However, the requirement for a specific format for the introduction of that evidence would appear to be controlled more by the necessity for a meaningful opportunity for the employee to be heard rather than any formalized procedure.

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In response to your fourth question, it appears difficult to imagine a situation where an evidentiary hearing could be closed as a matter of right. This is true, particularly in light of Arkansas' Freedom of Information Act. In the absence of a provision enabling certain information viewed as an unwarranted invasion of privacy from being disclosed, an individual's attempt to present evidence in executive session to the controlling authority of the State agency or organization in the presence of any individual other than the executive committee and the employee, would result in a violation of the State Freedom of Information Act. This exclusion of individuals, other than members of the executive committee and the involved employee, extends even to legal counsel for those parties.

In response to your final question, when a federal constitutionally protected right is involved and a state statute conflicts with that constitution provision, the federal constitution will control.

I would once again draw your attention to the enclosed opinion, originally prepared for Representative Wood, as providing amplification of this response.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Kay J. Jackson Demailly.

Sincerely,


STEVE CLARK
Attorney General

SC/KJD/ljm