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## 2022 SPRING CONFERENCE

Wrightsville Beach, N.C.  
April 13, 2022

### SUSPENSION AS A DISCIPLINARY ACTION AND APPEALS

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“ [N]or shall any State  
deprive any person of life,  
liberty, or property,  
without due process of  
law. ”

U.S. Const. 14th Amendment

## PROCEDURAL DUE PROCESS



# EMPLOYEE SUSPENSION AS DISCIPLINE

- **Determination of Contract Status, Property Interest or Liberty Interest**
  - Liberty interest
  - Contract right
  - Property interest
  - Statutorily-protected interest
  
- **Minimal due process regardless of interest or right**



# ***Cleveland Board of Education v. Loudermill***

## **470 U.S. 532 (1984)**

### **Facts and Background**

- Loudermill was hired by the Cleveland Board of Education as a security guard. He checked a box on his application that said he had never been convicted of a felony. He had been convicted of grand larceny in 1968.
- Upon learning of this lie, the Board of Education fired him. Loudermill was offered no opportunity to respond to the charges or to challenge his dismissal.
- Under Ohio law, Loudermill was a “classified civil servant.” A classified civil servant could only be terminated for cause and may obtain administrative review of their discharge.
- Loudermill filed an appeal with the Cleveland Civil Rights Service Commission. His argument was that he believed he had been convicted of a misdemeanor, not a felony.



# **Loudermill**

470 U.S. 532 (1984)

- To succeed on his claim, Loudermill needed to show that he had a property right in his employment that was protected by the Due Process Clause of the 14th Amendment.
- “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.’”
- “The Due Process Clause provides that certain substantive rights-life, liberty, and property-cannot be deprived except pursuant to constitutionally adequate procedures.”
- “In short, once it is determined that the Due Process Clause applies, ‘the question remains what process is due.’”



# Holding, *Loudermill*

470 U.S. 532 (1984)

- The deprivation of life, liberty, or property requires **notice** and **the opportunity to be heard**.
- The court balanced the interests of the two parties in this case. Ultimately, Loudermill had a more compelling interest in being afforded an opportunity to be heard than the Board of Education had in terminating an employee without a hearing.
- Part of this is because termination hearings are often fact specific. An opportunity to be heard would give Loudermill the chance to explain his side of events.
- “The right to a hearing does not depend on a demonstration of certain success.”
- It is important to note that the analysis **of the property interest** the Supreme Court undertook in this case was based on Ohio law. An analysis of a **property interest** in North Carolina would be different. However, once a property interest is established, the **due process** rights would fall under the same analysis.



# NORTH CAROLINA DUE PROCESS

*Presnell v. Pell*, 298 N.C. 715 (1979)

## Facts and Background

- Presnell was employed by the Surry County Board of Education as a manager of a cafeteria at Mountain Park Elementary School. She had worked there for 14 years.
- The principal falsely accused her of bringing liquor onto campus and distributing among the paints employed by the County who were doing work in the cafeteria.
- The Superintendent, Principal, and the Mountain Park Elementary School Board had a meeting without notice to Presnell or allowing her to be present. At the meeting, they agreed to terminate her.
- Presnell was not given an opportunity to present evidence or cross-examine her accusers.
- Presnell sued for a wrongful discharge and for slander due to the false accusations levied against her.



# ***Presnell v. Pell***

## 298 N.C. 715 (1979)

- “As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive, and its relief must be exhausted before recourse may be had to the courts.”
- The big question for the court was whether Presnell has a property interest protected by the 14th Amendment.
- “Nothing else appearing, an employment contract in North Carolina is terminable at the will of either party.”
- “We conclude that the mere dismissal of plaintiff without a pre-termination hearing did not abridge a proprietary interest of constitutional magnitude.”
- Thus, the court held that Presnell did not have a protected property interest in her employment at Mountain Park Elementary School.





# ***Presnell v. Pell***

## **298 N.C. 715 (1979)**

- However, this was not the end of the analysis. The 14th Amendment also protects a liberty interest.
- “The liberty interest here implicated — the freedom to seek further employment — was offended not by her dismissal alone, but rather by her dismissal based upon alleged unsupported charges which, left unrefuted, might wrongfully injure her future placement possibilities.”
- “Due process is satisfied under these circumstances by providing plaintiff an opportunity to clear her name in a hearing of record either before her discharge or within a reasonable time thereafter.”
- Since the cause of Presnell’s termination was a claim that she had distributed liquor on school campus, she had a liberty interest in clearing her name because that could affect her future chances at employment. Therefore, she was entitled to have an opportunity to clear her name in a hearing either before her discharge or within a reasonable time thereafter.



# TAKEAWAYS:

## *Loudermill and Pell*

- The 14th Amendment protects an interest in life, liberty, and property.
- Look at the employee's contract. Remember the language from Pell, "Nothing else appearing, an employment contract in North Carolina is terminable at the will of either party." If the employee has a contract (or statute) that provides a property interest, they have a property interest in their employment that must be protected by the 14th Amendment's Due Process Clause.
- If the employee does not have a contract, there still might be a liberty interest in their employment based on the terms of their discharge.
- If an employee has either a liberty or property interest, they must be given notice and an opportunity to be heard to comply with the 14th Amendment.



# DISCIPLINARY SUSPENSIONS

- What rights is the employee entitled to? How much process is the employee due?
  - Depends on classification of employee:
    - Classified employee / at-will
    - Classified employee with a contract
    - Licensed employees with career status
    - Licensed employees without career status (e.g., contract teachers)
    - Contract administrator with specific provisions regarding suspension



# EMPLOYEE DISCIPLINARY PROCEEDINGS

## □ Suspension With or Without Pay

- Legal issues
  - Public statements
  - Authority of person doing the suspending
  - Reasons for suspension
  - Timing of suspension
  - Follow procedure
- 



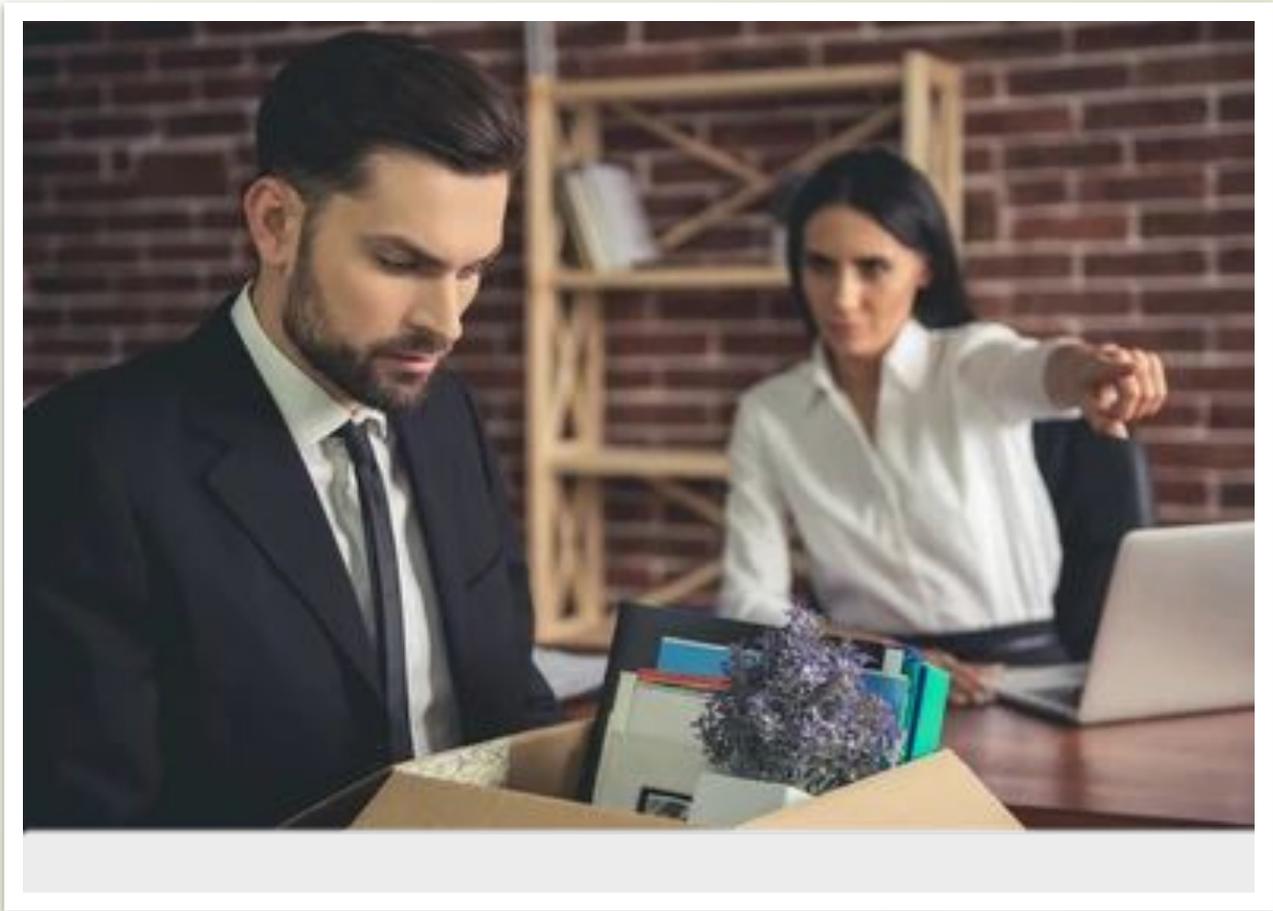
# EMPLOYEE DISCIPLINARY PROCEEDINGS

- Notice: Specify charges/grounds, and sufficiently describe evidence supporting grounds.
- Hearing: Hearing rights and procedures vary greatly. Make an adequate record of the proceedings.
- Board-Level Decision: Issued in timely manner.



# DISCIPLINARY SUSPENSIONS

- Suspension may be necessary or considered in order to allow for an effective investigation.
  - Suspension may be considered as a sanction short of or as an alternative to dismissal.
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# DISCIPLINARY SUSPENSIONS

## □ Suspension With Pay

- Generally, does not implicate due process considerations
- Not usually used as a disciplinary sanction
- Still must follow statutory requirements for licensed employees
- Suspension with pay statutes are different for career employees (G.S. §115C-325(f1)) and non-career licensed employees (G.S. §115C-325.5(c))
- No statutory process for classified employees

# DEFINITIONS

- “**Career employee**” – an employee who was awarded career status with that local board as a teacher prior to August 1, 2013.
- “**Disciplinary suspension**” – a final decision to suspend a **career employee** without pay **for no more than 60 days** under G.S. §115C-325(f)(2); or a contract teacher or administrator under G.S. §115C-325.5(b). (Emphasis added.)
- “**Teacher**” – a person who holds at least a current, not provisional or expired, Class A license or a regular, not provisional or expired, vocational license issued by the State Board of Education; whose major responsibility is to teach or directly supervises teaching or who is classified by the State Board of Education or is paid either as a classroom teacher or instructional support personnel; and who is employed to fill a full-time, permanent position. (G.S. §115C-325(a)(g) for career teachers; G.S. §115C-325.1(6)(4) for contract teachers.)



# DISCIPLINARY SUSPENSIONS

- **Suspension without pay prior to initiation of dismissal proceedings.**
  - G.S. §115C-325(f)(1) for career employees
  - G.S. §115C-325.5(a) for licensed contract employees
  - Follow process/procedure required prior to suspensions without pay prior to or in conjunction with initiation of dismissal proceedings



# DISCIPLINARY SUSPENSIONS

- **Suspension without pay as a sanction**
  - Results in loss of compensation, a property right, which implicates due process
  - Must follow statutory process for licensed employees:
    - For career status: G.S. §115C-325(f)(2)
    - For non-career status: G.S. §115C-325.5(b)
  - Follow process/procedure required prior to disciplinary suspension without pay for licensed employees



# DISCIPLINARY SUSPENSIONS

## LICENSED EMPLOYEE SUSPENSION WITHOUT PAY

- Before any suspension of a licensed employee without pay, the superintendent must:
  - Meet with the employee (except if the employee is incarcerated/in custody)
  - Give written notice of the charges and an explanation of the bases for the charges
  - Allow the employee an opportunity to respond.

# DISCIPLINARY SUSPENSIONS

## LICENSED EMPLOYEE SUSPENSION WITHOUT PAY

- The grounds for any suspension without pay for a licensed employee are the same 15 grounds as for a dismissal under both Teacher Tenure Law (for career status teachers), G.S. § 115C-325(e)(1), and under G.S. § 115C-325.4(a) (for contract teachers):

- |   |  |
|---|--|
| 1. Inadequate performance   | 9. Failure to fulfill statutory duties and responsibilities  |
| 2. Immorality   | 10. Failure to comply with board policies  |
| 3. Insubordination  | 11. Any cause which constitutes grounds for license revocation   |
| 4. Neglect of Duty  | 12. RIF  |
| 5. Physical or mental incapacity  | 13. Failure to maintain license  |
| 6. Habitual or excessive use of alcohol or controlled substance                       | 14. Failure to repay money owed to the State   |
| 7. Conviction of a felony or crime involving moral turpitude                          | 15. Providing false information or knowingly omitting a material fact on application or in preemployment |
| 8. Advocating overthrow of the government by force, violence, or other unlawful means |  |



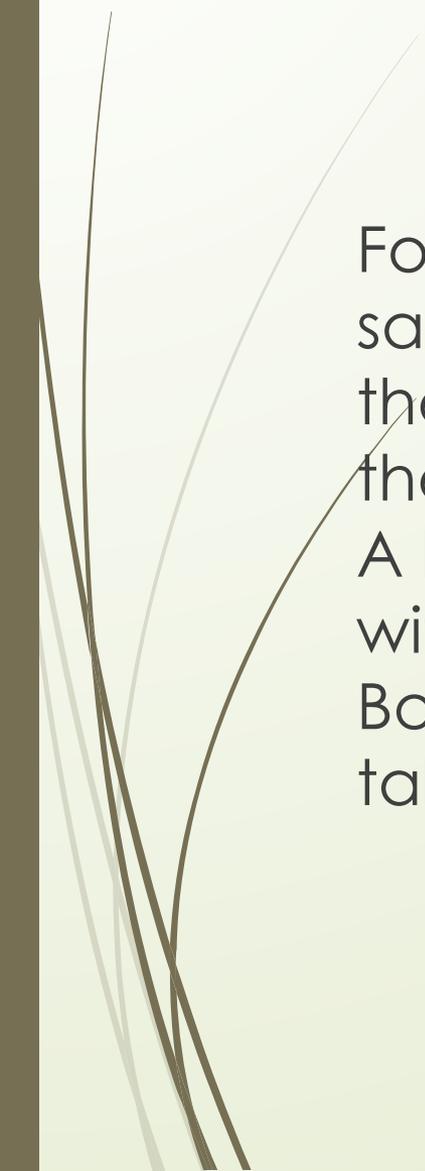
# PROCESS FOR SUSPENSION WITHOUT PAY

Incident to dismissal charges or prior to dismissal charges:

- If the superintendent believes that cause exists for dismissal and immediate suspension is necessary, superintendent may suspend without pay at the meeting described above.
- Within 5 days, the superintendent shall either initiate dismissal, demotion or disciplinary suspension without pay proceedings or reinstate employee.
- If it is finally determined that there are no grounds for dismissal, demotion or disciplinary suspension without pay, the employee shall be immediately reinstated and paid for the period of suspension, and all records of the suspension removed from employee's file.
- This is the same for career employees (G.S. § 115C-325(f)(1)) and contract licensees (G.S. § 115C-325.5(a)).



# PROCESS FOR SUSPENSION WITHOUT PAY



For a disciplinary suspension without pay as a sanction, the superintendent must meet with the employee (as provided above), providing the written notice and opportunity to respond. A licensed employee then is entitled to 15 days within which to request a hearing before the Board of Education, prior to the suspension taking place.



# PROCESS FOR SUSPENSION WITHOUT PAY

- If the teacher/licensed employee requests a Board hearing, the procedures are different depending on the contract status.
- For career employees, two types of Board hearings under G.S. §115C-325(f)(2):
  - For a suspension without pay of more than 10 days, **or** if the suspension is for intentional misconduct (e.g., inappropriate sexual or physical conduct, immorality, insubordination, habitual or excessive use of alcohol or non-medical use of controlled substance, cause which constitutes grounds for license revocation, or providing false information) an employee is entitled to a full-blown due process Board hearing pursuant to G.S. §115C-325(j)(3).
  - For a disciplinary suspension of up to (but no more than) 10 days, for nonintentional misconduct (as described above) a Board hearing is conducted pursuant to G.S. §115C-325(j)(2), based on documentary evidence and oral arguments.



# PROCESS FOR SUSPENSION WITHOUT PAY

- Non-career status licensed contract employees suspended without pay may request a hearing within 15 days, to be conducted pursuant to G.S. §115C-325.7, which provides a full-blown due process hearing before the Board. (G.S. §115C-325.5(b))



# PROCESS FOR SUSPENSION WITHOUT PAY

What if the teacher does not request a hearing?

- If no request for hearing is made within 15 days, the superintendent may file his or her recommendation with the Board.



# PROCESS FOR SUSPENSION WITHOUT PAY

## Board Determination

- If, after hearing the recommendation of the superintendent and the evidence introduced at the hearing (if one is held) the Board concludes that the grounds for the recommendation are true and have been substantiated by “a preponderance” of the evidence, the Board may “by resolution” order such suspension without pay.



## Right of Appeal for Career Employees

- Any career employee who has been suspended without pay under G.S. §115C-325(f)(2) has a statutory right to appeal from the board's decision to the superior court for the superior court district in which the career employee is employed.

## Grounds for Right to Appeal to Superior Court

- The career employee has the right to appeal from the board's decision to the superior court on one or more of the following grounds:
  1. The board's decision is in violation of constitutional provisions.
  2. The board's decision is in excess of the statutory authority or jurisdiction of the board.
  3. The board's decision was made upon unlawful procedure.
  4. The board's decision is affected by other error of law.
  5. The board's decision is unsupported by substantial evidence in view of the entire record as submitted.
  6. The board's decision is arbitrary or capricious.

**G.S. §115C-325(n)**

## Right of Appeal for Contract Teachers

- A teacher who ... has received a disciplinary suspension without pay as provided in G.S. §115C-325.5; and
- Requested and participated in a hearing before the local board of education.

## Grounds for Right to Appeal to Superior Court

- "... shall have a further right of appeal from the final decision of the local board of education to the superior court of the State on one or more of the following grounds that the decision:
  1. Is in violation of constitutional provisions.
  2. Is in excess of the statutory authority or jurisdiction of the board.
  3. Was made upon unlawful procedure.
  4. Is affected by other error of law.
  5. Is unsupported by substantial evidence in view of the entire record as submitted.
  6. Is arbitrary or capricious."
- The superior court shall have authority to affirm or reverse the local board's decision or remand the matter to the local board of education. The superior court shall not have authority to award monetary damages or to direct the local board of education to enter into an employment contract of more than one year, ending June 30.

**G.S. §115C-325.8**



# NEGOTIATED AGREEMENTS FOR SUSPENSION WITHOUT PAY

The time, expense and process required for a disciplinary suspension without pay (which cannot exceed 60 days) are significant.

- Consider a negotiated agreement with the employee for:
  - a disciplinary suspension of up to 60 days without pay in lieu of termination; or
  - something less than 60-days suspended without pay.
- The employee may enter into such an agreement and waive any hearing rights.



# DISCIPLINARY SUSPENSION OF OTHER EMPLOYEES

- What about other categories of employees?  
Can they be suspended without pay as a sanction?
  - Yes.
  - And they also get due process
- Classified, At-Will
- Classified, with contract term
- Licensed but not with the statutes for career employees or contract teachers



# DISCIPLINARY SUSPENSION OF OTHER EMPLOYEES

## *Appeal to Board of Education under G.S. §115C-45(c)*

- A person may appeal to the local board of education from any final administrative decision in the following matters:  
...
- 2. An alleged violation of a specified federal law, State law, State Board of Education policy, State rule, or local board policy, including policies regarding grade retention of students;
- 3. The terms or conditions of employment or employment status of a school employee; and
- 4. Any other decision that by statute specifically provides for a right of appeal to the local board.
- “Final administrative decision” means a decision of a school employee from which no further appeal to a school administrator is available.



# Two Procedural Requirements For ALL Hearings Under G.S. §115C-45(c)

- In all appeals to the board, it is the duty of the board of education to see:
  - that a proper notice is given to all parties concerned; and
  - that a record of the hearing is properly entered in the records of the board conducting the hearing.



# Appeal of Right

- An appeal of right brought before a local board of education under subdivision (1), (2), or (4) may be further appealed to the superior court of the State on the grounds that the local board's decision is:
  - in violation of constitutional provisions;
  - in excess of the statutory authority or jurisdiction of the board;
  - made upon unlawful procedure;
  - affected by other error of law;
  - unsupported by substantial evidence in view of the entire record as submitted; or
  - arbitrary or capricious.

**G.S. §115C-45(c)**



# **PRACTICAL TIPS UPON SUSPENSION WITH OR WITHOUT PAY**

- Removal of personal items from office or room
- Obtain school property, keys, ID badge from employee
- Eliminate access to facilities, computers, internet system
- Assignment of other duties
- Reporting to supervisor during suspension
- Telephone or other availability
- Contact with other employees



# **DON'T FORGET REPORTING REQUIREMENTS MAY ALSO HAVE TO BE FOLLOWED**

- When to report to investigative/law enforcement agencies
- Child abuse or neglect
- Certain misconduct of certified/licensed employees that violates professional or ethical standards – Report to DPI (and, if appropriate, other licensing agencies)
- Certain criminal acts
- Specific acts of violence on campus
- Sexual or other improper acts between teacher and student

**THESE CANNOT BE NEGOTIATED AWAY IF THEY ARE  
MANDATORY REPORTS!**



**ANY QUESTIONS?**