RASHI REED	*	**NO. 2006-CA-1498**
VERSUS	*	**COURT OF APPEAL**
DEPARTMENT OF POLICE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
DONNA AUBERT	**NO. 2006-CA-1500**
VERSUS	
DEPARTMENT OF POLICE	

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
SHYRA ALLEN	**NO. 2006-CA-1647**
VERSUS	
DEPARTMENT OF POLICE	

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
WILLIE LEE	**NO. 2007-CA-0171**
VERSUS	
DEPARTMENT OF POLICE	

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
RONALD MOORE	**NO. 2007-CA-0360**
VERSUS	
DEPARTMENT OF POLICE	

CONSOLIDATED WITH: **CONSOLIDATED WITH:**

ERIC DOUCETTE **NO. 2007-CA-0361**

VERSUS

DEPARTMENT OF POLICE

CONSOLIDATED WITH: **CONSOLIDATED WITH:**

CARL DAVIS **NO. 2007-CA-0364**

VERSUS

DEPARTMENT OF POLICE

CONSOLIDATED WITH: **CONSOLIDATED WITH:**

SHAWN MADISON **NO. 2007-CA-0366**

VERSUS

DEPARTMENT OF POLICE

CONSOLIDATED WITH: **CONSOLIDATED WITH:**

RHONDA HILL **NO. 2007-CA-0367**

VERSUS

DEPARTMENT OF POLICE

CONSOLIDATED WITH: **CONSOLIDATED WITH:**

KERMIT HENRY **NO. 2007-CA-0368**

VERSUS

DEPARTMENT OF POLICE

CONSOLIDATED WITH: **CONSOLIDATED WITH:**

ERROL WASHINGTON **NO. 2007-CA-0796**

VERSUS

DEPARTMENT OF POLICE

CONSOLIDATED WITH: **CONSOLIDATED WITH:**

LEANDER WINFORD **NO. 2007-CA-0797**

VERSUS

DEPARTMENT OF POLICE

*** * * * * * ***

APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NOS. 7104 C/W 7119 C/W 7089 C/W 7099 C/W 7101 C/W 7115 C/W 7272 C/W 7284 C/W 7117 C/W 7118 C/W 7113 C/W 7114
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF CHIEF JUDGE JOAN BERNARD ARMSTRONG, JUDGE CHARLES R. JONES, JUDGE PATRICIA RIVET MURRAY, JUDGE JAMES F. MCKAY III, JUDGE DENNIS R. BAGNERIS SR., JUDGE MICHAEL E. KIRBY, JUDGE TERRI F. LOVE, JUDGE MAX N. TOBIAS, JR., JUDGE DAVID S. GORBATY, JUDGE EDWIN A. LOMBARD, JUDGE LEON A. CANNIZZARO, JR., JUDGE ROLAND L. BELSOME)

CANNIZZARO, J., CONCURS WITH REASONS.
BAGNERIS, J., DISSENTS FOR THE REASONS ASSIGNED BY JUDGE LOMBARD.
LOVE, J., DISSENTS.
LOMBARD, J., DISSENTS.
BELSOME, J., DISSENTS WITH REASONS.

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JUDGMENTS VACATED ; REMANDED WITH INSTRUCTIONS.

OCTOBER 10, 2007

We consolidated these matters solely to consider the common issue of whether the New Orleans Civil Service Commission ("CSC") erred as a matter of law by holding that because the New Orleans Police Department ("NOPD") did not hold pre-termination hearings pursuant to CSC Rule IX, §1.2, the discipline imposed against the plaintiffs/appellees, all NOPD officers, was illegal.[1] For the

[1] Rule IX, §1.2 provides:

> In every case of termination of employment of a regular employee, the appointing authority shall conduct a pre-termination hearing as required by law and shall notify the employee of the disciplinary action being recommended prior to taking action.

reasons that follow, we hold that Hurricane Katrina, with its effects upon the city of New Orleans and its government, was an extraordinary event such that the NOPD could discipline the officers without a pre-termination hearing. We further hold that, under these unique circumstances, a post-termination hearing, which allows the accused officer an opportunity to present all relevant evidence he/she would have introduced at a pre-termination hearing to overturn the NOPD's decision, satisfies the due process requirements of both the United States and Louisiana Constitutions.[2]

The only issue before us is whether these officers were denied due process for the NOPD's failure to grant them a pre-termination hearing. In *Cleveland Bd. of Education v. Loudermill*, 470 U. S. 532, 542, 105 S. Ct. 1487, 1493, 84 L.Ed.2d 494 (1985), the United States Supreme Court stated:

> 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, 70 S.Ct. 652, 656, 94 L.Ed.2d 865 (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." **FN7** *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original); see *Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in

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[2] An additional issue raised on appeal was whether the NOPD could rely upon Rule IX, §1.1 of the CSC Rules as setting forth prohibited conduct by classified employees. Although the termination letters sent to each of the officers did not cite an internal NOPD rule violated by them, the letters stated that the officers had not reported to duty, had abandoned their posts, etc., without permission and/or contact with their chain of command. Under the circumstances, we find the NOPD's failure to cite a specific internal rule is without moment for such a violation is so obvious that a citation of authority is unnecessary. Thus, we find that *Knight v. Department of Police*, 619 So. 2d 1116, 1120 (La. App. 4 Cir.), *writ denied*, 625 So. 2d 1058 (La. 1993), is inapplicable to this case.

> his employment. *Perry v. Sindermann*, 408 U.S. 593, 599, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570. As we pointed out last Term, this rule has been settled for some time now. *Davis v. Scherer*, 468 U.S. 183, 192, n. 10, 104 S.Ct. 3012, 3018, n. 10, 82 L.Ed.2d 139 (1984); id., at 200-203, 104 S.Ct. 3022-3024 (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, 99 S.Ct. 2642, 61 L.Ed.2d 365 (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"). [Emphasis added.]

In footnote seven referenced above, the Court recognized an exception:

> **There are, of course, some situations in which a postdeprivation [sic] hearing will satisfy due process requirements.** See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908). [Emphasis added.]

In *Bell v. Dep't of Health and Human Res.*, 483 So. 2d 945 (La.), *cert. denied*, 479 U. S. 827, 107 S. Ct. 105, 93 L. Ed. 2d 55 (1986), the Louisiana Supreme Court stated:

> The provisions of the state constitution involving the Civil Service, Article X, § 1 *et seq*., and the Rules of the Commission are designed to secure adequate protection to the public career employee from political discrimination. They embrace the merit system, and their intent is to preclude favoritism. The purpose of the Civil Service Rules is **to guarantee** the security and welfare of the public service. *Sanders v. Department of Health & Human Resources*, 388 So. 2d 768 (La. 1980) (emphasis added). With this in mind, it is clear that tenure or

> classified civil service status is a property right within the meaning of Article I, § 2 of our constitution, a prerequisite to a due process challenge. *Delta Bank & Trust Co. v. Lassiter*, 383 So. 2d 330 (La. 1980). Under our constitution and the Civil Service Rules, an employee who has gained classified permanent civil service status has an entitlement to his position, since he has already received the position, and applicable law guarantees him continued employment, save for some exceptions (i.e. disciplinary sanctions for cause). *Cleveland Bd. of Educ. v. Loudermill, supra; Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L. Ed.2d 15 (1974); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972). Having concluded that a classified permanent employee enjoys a property right in maintaining his status, it is axiomatic that his position may not be changed or abolished without due process of law. *Cleveland Bd. of Educ., supra*. The question becomes what process is due.
>
> The decisions of the United States Supreme Court, as well as the jurisprudence of this state, underscore the truism that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldrige,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). It is a flexible standard and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer,* 408 U.S. 471, 92S. Ct. 2593, 33 L.Ed.2d 484 (1972). It is particularly flexible in the area of administrative law. *See Smith v. Division of Admin.*, 415 So. 2d 381 (La. App. 1st Cir. 1982); *Hamilton v. La. Health & Human Resources Admin.*, 341 So. 2d 1190 (La. App. 1st Cir. 1976), *writ refused*, 344 So. 2d 4 (La. 1977). Where the power of the government or an agency is to be used against an individual there is a right to a fair procedure to determine the basis for, and the legality of, such action. Nowak, J., et al., *Handbook on Constitutional Law,* Ch. 15, p. 477 (1978).

Id. at 949-50. [Underlined emphasis added.]

In *Fields v. State Through Dept. of Public Safety and Corrections,* 98-0611, pp. 7-8 (La. 7/8/98), 714 So. 2d 1244, 1251, the Supreme Court clarified its position:

> Generally, before a person is deprived of a protected interest, he must be afforded some kind of hearing. However, this court has often recognized **there may be circumstances involving a valid governmental interest which justify postponing the hearing until after the event**. *In re Adoption of B.G.S.*, 556 So. 2d 545, 553 (La. 1990). A deprivation without opportunity for a prior hearing or other effective substitute safeguard has been allowed in **"extraordinary" or "truly unusual" situations.** *Paillot v. Wooton*, 559 So. 2d 758, 762 (La. 1990). "[E]mergency action may be proper pending a hearing when matters of public health and safety are involved." *Id. See also Wilson v. City of New Orleans*, 479 So. 2d 891 (La. 1985) and *Bell v. Department of Health and Human Resources*, 483 So. 2d 945, 951 (La.), *cert. denied*, 479 U. S. 827, 107 S. Ct. 105, 93 L. Ed. 2d 55 (1986) ("[W]e note that **there seems to be an emerging concept that in some instances due process is fulfilled by a 'post deprivation' hearing**. We believe that this view to procedural due process in certain situations is sound and is in support of our decision here.").

Id. [Emphasis added.]

It is unnecessary for this court to describe the emergency conditions existing in New Orleans during and after Hurricane Katrina. Thus, we note the obvious negative effect that an absence of discipline for these officers would have on those who remained at their posts under the most unusual and trying of circumstances. In *Stevens v. Department of Police*, 00-1682, p.8 (La. App. 4 Cir. 5/9/01), 789 So. 2d 622, 627, we stated:

> The public puts its trust in the police department as a guardian of its safety, and it is essential that the appointing authority be allowed to establish and enforce appropriate standards of conduct for its employees sworn to uphold that trust. *Newman, supra* [*v. Department of Fire*, 425 So.2d 753 (La.1983)]. Indeed, the Commission should give heightened regard to the appointing authorities that serve as special guardians of the public's safety and operate as quasi-military institutions where strict discipline is imperative.

We can hardly envision a scenario when enforcing appropriate standards of conduct was ever more important than in the aftermath of Hurricane Katrina. In addition, we find that the CSC's rulings relying solely on the absence of a pre-termination hearing when truly extraordinary circumstances present themselves would set a dangerous precedent on future disciplinary actions of the NOPD.

For the foregoing reasons, we find that the CSC erred in reversing the orders of discipline against the plaintiffs/appellees on the sole basis that no pre-termination hearings were afforded to them.

We therefore vacate the decisions of the CSC in each of these consolidated cases. We remand the cases to the CSC for them to receive from the parties such additional evidence as necessary to appropriately resolve each of the cases and to render a judgment on the merits of each case. In that regard, the CSC is specifically instructed to permit each of the plaintiffs/appellees to introduce at the post-termination hearing such additional evidence as he or she might have provided to the appointing authority at a pre-termination hearing if same had been afforded. The right of each party to appeal a new subsequent judgment of the CSC following its ruling on the merits of each case is preserved.

JUDGMENTS VACATED ; REMANDED WITH INSTRUCTIONS.