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

"The Constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his [property rights]." *Wilson v. City of New Orleans*, 479 So.2d 891, 894 (La. 1985). It is undisputed that, historically, due process has been a fundamental precept of our legal system, *see Baldwin v. Hall*, 1 Wall 223, 17 L.Ed.531 (1864), or that the right to notice and an opportunity to be heard must be granted at "a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67 (1972). [1]

During and immediately after Hurricane Katrina swept through New Orleans on August 29, 2005, some police officers were absent from their posts. Nearly two months later, on October 24, 2005, letters were mailed to this group of officers, terminating them without any notice or opportunity to be heard, even though – as in the case of Officer Reed – many had contacted their supervisors in the days immediately following the hurricane, were advised of a 30-day suspension,

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[1] *See also, Goss v. Lopez*, 419 U.S. 565, 580 (1975)(citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring) ('"[F]airness can rarely be obtained by a secret one-sided determination of facts decisive of rights . . . .' 'Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it.'").

returned to New Orleans and were in contact with their immediate supervisors regarding reporting to duty at the end of the suspension period. In sanctioning the City's illegal termination of the officers nearly two months after Hurricane Katrina[2], the majority ignores the clear-cut procedural due process requirements of the federal and state constitutions[3], as well as the Rules of the New Orleans Civil Service Commission, and creates a dangerous new precedent.

Even in extraordinary circumstances, an individual whose interests may be affected by a deprivation of life, liberty, or property must be granted a fair procedure before a fair decision maker.[4] In some circumstances, due process may not require a full-blown, trial-type hearing, but that is not to say that some sort of rudimentary precautions afforded by an informal notice and opportunity to respond are not necessary.[5] Due process is a flexible standard, *Morissey v.Brewer,* 408 U.S. 471 (1972), and courts have been flexible in finding that a meaningful and prompt post-deprivation process will suffice where prior notice and opportunity to be heard is not a meaningful protection.[6] Significantly, however, no other court

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[2] Notably, the City submitted no evidence into the record before the Commission or this court to support its claim that exigent circumstances required that due process requirements be cast aside approximately two months after Hurricane Katrina, although asserting that the City should be excused from failing to make any attempt to afford the accused officers minimal notice and opportunity to be heard because of exigent circumstances. Apparently, evidentiary rules as well as constitutional due process should be disregarded with regards to those cases arising out of the Hurricane Katrina aftermath. It is somewhat ironic, however, that the City argues that the catastrophic conditions following Hurricane Katrina created an excuse for the City's failure to follow clear constitutional mandates while, in effect, arguing that their employees should be afforded no opportunity to explain their own failures in the post-Katrina chaos.

[3] Both the Fourteenth Amendment to the United States Constitution and Article I, §2 of the 1974 Louisiana Constitution specifically protect a person against deprivation of his/her life, liberty, or property with "due process of law", a term which simply means that persons whose rights may be affected are entitled to be heard and, in order to enjoy that right, must first be notified.

[4] "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits." *Wilson, supra,* (citing *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915)).

[5] *See Paillot v. Wooton*, 559 So.2d 758, 761 n.3 (La. 1990) (informal hearing process involving merely discussing with student misconduct which has occurred only moments before may be sufficient in some cases but "such opportunity must be provided"; post-deprivation notice and rudimentary hearing sufficient only "when student poses a continued threat of danger to persons or property or disruption to the academic process").

[6] *See Bell v. Department of Health and Human Resources*, 483 So.2d 945 (La. 1986) (employment reallocation) and *Wilson, supra* (temporary impoundment of a vehicle when the owner fails to present proof of insurance); se*e also Ewing v. Mytinger & Casselberry, Inc.* 339 U.S. 594 (1950) (challenged statute permitting multiple seizures of

has ever sanctioned a permanent deprivation/termination of employment implemented without pre-deprivation/pre-termination of employment notice and hearing.[7]

While it may be emotionally satisfying or politically expedient to circumscribe the rights of a police officer accused of deserting his post in the midst of a community disaster, to do so in this case sets a dangerous precedent, curtailing important constitutional protections and overriding the long-held bright-line rule that a permanent deprivation requires pre-deprivation due process. Even accepting *arguendo* that Hurricane Katrina was an extraordinary event allowing for the temporary curtailment of constitutional protections, these terminations took place nearly two months after that event.

The majority asserts, however, that the violation of the constitutional rights of these police officers should be sanctioned because "an absence of discipline" will result in an "obvious negative effect" on other officers who remained at their posts during the chaos and disorder following the levee breach.[8] To mischaracterize procedural due process prior to termination as an "absence of discipline" implies that police officers, alone of civil service employees, are not

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misbranded articles on a finding of probable cause by an administrator, without a hearing, is not unconstitutional under the due process clause); *North American Cold Storage Co. v. Chicago,* 211 U.S. 306 (1908) (due process of law is not denied the owner or custodian of food in cold storage by a municipal ordinance under which such food , when unfit for human consumption, may summarily be seized, condemned, and destroyed by municipal officers without a preliminary hearing); *F.D.I.C. v. Mallen*, 108 U.S. 230 (1988) (bank official not entitled to pre-suspension hearing under statute authorizing suspension from office of indicted official of federally insured bank; important governmental interest in protecting depositors and maintaining public confidence, coupled with the fact that felony indictment provided sufficient assurance that suspension was not baseless, justified prompt action before suspensions hearing was held).

[7] *See, e.g., Bell*, 483 So.2d at 951 (distinguishing termination situation from reallocation); *Fields*, 714 So.2d at 1255 ("In the instant case, we are dealing only with the temporary impoundment of a motor vehicle because it did not contain the statutorily required proof of insurance").

[8] In a similar vein, the City characterized reinstatement with backpay as a "reward" and argued that its interest in "maintaining the battered public fisc", combined with the catastrophic conditions following Hurricane Katrina, outweighs any individual's right to a pre-termination hearing as long as some sort of post-deprivation hearing can be devised. Notably, no jurisprudence (including that cited by the City) supports the proposition that concern for public finances in the aftermath of a community catastrophe outweighs the due process rights of individuals or that a governmental entity is entitled to affirmation of its transgressions because to find otherwise will ultimately be at the

entitled to procedural due process. It is difficult to conceive that adopting this implication - that police officers are not entitled to the same constitutional and statutory protections as other similarly situated persons[9] - will bolster the morale of the police department or validate the decisions of the police officers who reached their designated duty posts and remained throughout the storm's aftermath. The police department may be a *de facto* "quasi-military" institution but police officers are classified as civil servants under the law and, until that classification is changed, are entitled to all of the protections (including procedural due process) afforded civil service employees.[10]

Likewise, it is specious to say that due process will be satisfied by allowing the "accused officers" to supplement the record "with all relevant evidence he/she would have introduced at a pre-termination hearing to *overturn the NOPD's decision.*" (Emphasis added) The purpose of the right to be heard is to minimize the likelihood of a substantially unfair or mistaken deprivation. Thus, the intimation that a termination decision is pre-determined before the hearing, subordinating the hearing itself to an appeal of that decision, suggests a departure from the basic standards of due process.

Finally, the termination letter sent by the City, citing a civil service rule as the sole basis for dismissal is contrary to the clear language of Civil Service Rule IX and thus, as observed by the Commission, the officers have yet to be charged

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cost of the public treasury, nor did the issue of the "battered public fisc" merit consideration in the recent decision, *Decorte v.Jordan*, ___ F.3d ___, 2007 WL 2319107 (5th Cir. 2007).

[9] *See, e.g., Fuller, et al v. Department of Fire,* 07-0369 (La. 4 Cir. 9/19/07) (reversing suspension of firefighters who were absent from their posts after the hurricane, failing to return until well after the September 22, 2005, deadline imposed by the New Orleans Fire Department, because application of across-the-board deadline for return was arbitrary and capricious when co-workers had failed to convey cut-off date to them and firefighters "did the best they could under horrific conditions to return to work as quickly as possible").

[10] *See* CSC Rule IX §1.2 (amended effective February 1, 1988; emphasis added) ("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).

with a violation of an internal police department rule.[11] Presumably, the police department's internal rules address the officers' actions in these cases and, as the issue before the court is whether the officers were afforded their constitutional and statutory rights to *notice* and opportunity to be heard, not whether the officers' actions should ultimately serve as a basis for their termination, I disagree with the conclusion that the NOPD's failure to site a specific internal rule "is without moment."

Major disasters do not permit the curtailment of constitutional protections. Accordingly, I would affirm the Civil Service Commission's determination that a termination without the requisite due process is illegal.

For the foregoing reasons, I respectfully dissent.

[11] In *Knight v. Department of Police*, 619 So.2d 1116, 1118 (La. App. 4th Cir.), *writ denied*, 625 So.2d 1058 (La. 1993), the court clearly stated that Rule IX is directed to the appointing authorities and "simply cannot be construed as a rule setting forth prohibited conduct by classified employees." *Knight*, 625 So.2d at 1120; *see also Brumfield v. Department of Fire*, 488 So.2d 1181 (La. App. 4th Cir. 1986) (reversing Commission's ruling that the Superintendent of the Fire Department acted within its boundaries of the regulations of the Department of Fire in invoking Rule IX of the Civil Service Commission to dismiss the plaintiff for inability or unwillingness to perform his duties basis for their termination).