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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BRIAN J. MCMAHON, Plaintiff and Appellant, v. BOARD OF TRUSTEES OF THE EL CAMINO COMMUNITY COLLEGE DISTRICT, Defendant and Respondent.	B150910 (Los Angeles County Super. Ct. No. BS047821)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dzintra Janavs, Judge. Reversed with directions.

Brian J. McMahon, in pro. per., for Plaintiff and Appellant.

Liebert Cassidy Whitmore and Mary L. Dowell for Defendant and Respondent.

Brian J. McMahon (appellant) appeals the trial court's denial of his writ of mandate challenging the decision of the Board of Trustees of the El Camino Community College District (the District) to dismiss him from his tenured faculty position due to evident unfitness for service. Appellant contends that he was denied due process pursuant to *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 (*Skelly*). Appellant is correct. On that basis, we reverse. The trial court shall issue a peremptory writ of mandate directing the District to set aside its decision to dismiss appellant.

PROCEDURAL AND FACTUAL HISTORY

On November 18, 1996, the District's president recommended that its board of trustees dismiss appellant due to "dishonesty, evident unfitness for service, and persistent violation of District regulations."[1]

The District served appellant with a letter that stated: "You are notified that you are dismissed from employment with the El Camino Community College District effective ninety days from November 18, 1996. Unless a written request for a hearing signed by you or on your behalf is delivered or mailed to the El Camino Community College District within thirty (30) days of the date of the Statement of Decision was personally served on you, the El Camino Community College District will make your dismissal effective without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Objection to Decision, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to President Thomas J. Fallo, El Camino Community College District[.]" The District also served appellant with a statement of decision to dismiss and

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1 Education Code section 44932, subdivision (a) provides: "No permanent employee shall be dismissed except for one or more of the following causes: [¶] . . . [¶] (3) Dishonesty. [¶] (4) . . . [¶] (5) Evident unfitness for service. [¶] . . . [¶] (7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him."

a statement of charges, copies of various sections of the Education Code, and a blank notice of objection to the statement of dismissal. The president's statement of charges contained 24 separate charges of misconduct.

Appellant served the notice of objection to decision on December 13, 1996, thereby requesting a hearing. His termination took effect on February 16, 1997. The administrative hearing was held May of 1997, and the administrative law judge issued his decision upholding the dismissal on October 1, 1997.

Appellant filed a writ of mandate, challenging his termination on various grounds, including that he was denied due process rights under *Skelly*. The District conceded in its opposition brief before the trial court that appellant's termination was effective on February 16, 1997. Following a hearing on the matter, the trial court entered judgment in favor of the District.

This timely appeal followed.

STANDARD OF REVIEW

Normally we would review a trial court's denial of a writ of mandate following administrative proceedings under the substantial evidence rule. (*West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1775.) However, when an appellant's "contention regarding procedural matters presents a pure question of law involving the application of the due process clause, we review the trial court's decision de novo.' [Citation.]" (*Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 107.)

DISCUSSION

The due process clauses of the federal and state Constitutions provide that a person may not be deprived of life, liberty, or property without due process of law. (Cal. Const., art. I, § 7, subd. (a); U.S. Const., 14th Amend., § 1.) Appellant's claim rests on the contention that he has a property interest in his faculty position and that the District terminated him without due process. We agree.

In *Gilbert v. Homar* (1997) 520 U.S. 924 (*Gilbert*), the Supreme Court noted that "public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process[.] [Citation.]" (*Id*. at pp. 928-929.) Education Code section 87732[2] provides that a regular employee shall not be dismissed except for specified causes. There is no dispute that appellant is a regular employee and that he accordingly has a property interest in his tenure entitling him to due process before termination.

The pivotal question presented by this appeal is whether the process appellant received was sufficient.

We begin with *Skelly*, in which our Supreme Court stated: "It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Skelly, supra,* 15 Cal.3d at p. 215.)

On the issue of pretermination hearings, the United States Supreme Court, in *Cleveland Bd. of Education v. Loudermill* (1985) 470 U.S. 532, 542 (*Loudermill*), stated: "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.' [Citations.] This principle requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment."

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[2] All further statutory references are to the Education Code unless otherwise indicated.

In 1997 the United States Supreme Court indicated that an employee is not always entitled to a hearing prior to being deprived of property. In *Gilbert*, the plaintiff was employed as a police officer at a state university. While at the home of a friend, he was arrested by state police during a drug raid. Later that day, the plaintiff was charged with various drug offenses. Upon learning of the arrest, the university administration immediately suspended the plaintiff without pay. A month later, the university demoted the plaintiff to the position of groundskeeper. After the criminal charges were dropped, the university voluntarily gave the plaintiff back pay. The plaintiff then brought suit, alleging that the university had violated his right to due process by suspending him without a hearing. In deciding against the plaintiff, the Supreme Court stated: "'[W]e have rejected the proposition that [due process] always requires the State to provide a hearing prior to the initial deprivation of property.' . . . [¶] . . . To determine what process is constitutionally due, we have generally balanced three distinct factors: [¶] 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.'" (*Gilbert, supra*, 520 U.S. at p. 931.) After applying the three factors, the *Gilbert* court concluded that the plaintiff was not entitled to a predeprivation hearing and had not been denied due process.

Applying the three factors in *Gilbert*, we conclude that appellant was entitled to at least an informal pretermination hearing.

The first factor favors appellant. *Gilbert* noted that "'in determining what process is due, account must be taken of 'the length' and 'finality of the deprivation.'" (*Gilbert, supra*, 520 U.S. at p. 931.) Unlike the plaintiff in *Gilbert*, who was merely demoted, appellant lost his job and his source of income. Also, our Supreme Court in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102 (*Coleman*) explained: "When loss of the vested right to continued state employment results from a disciplinary dismissal, the attendant stigma of the discharge may threaten the affected employee's

future livelihood. For instance, a disciplinary discharge resulting from dishonesty or insubordination tarnishes the employee's good name and may therefore hamper the ability to obtain future employment. [Citation.]" (*Id*. at p. 1120.) As *Loudermill* stated: "[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. [Citations.] While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. [Citation.]" (*Loudermill, supra*, 470 U.S. at p. 544.) Appellant's termination and the attendant stigma are so significant that they called for a pretermination hearing.

Regarding the second factor in our analysis, *Loudermill* is instructive. "[S]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. [Citation.] Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect. [Citations.]" (*Loudermill, supra*, 470 U.S. at p. 544.)

As indicated by *Loudermill*, disciplinary charges often involve factual disputes. Appellant did in fact have an opportunity to state his position in writing[3] before he was

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[3] As we have already indicated, the District informed appellant that he could respond to the notice of intent to dismiss in the manner provided by Government Code section 11506. Subdivision (a) of that statute provides: ". . . the respondent may file with the agency a notice of defense in which the respondent may: [¶] (1) Request a hearing. [¶] (2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed. [¶] (3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense. [¶] (4) Admit the accusation in whole or in part. [¶] (5) Present new matter by way of defense. [¶] (6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights."

terminated, but there is no evidence that if he had submitted a statement that it would have been reviewed prior to his termination.[4] Also, although appellant was given the option of presenting new matter or filing a simple form objection, he was never warned that by filing the form objection that he would be giving up an important pretermination right to defend himself. Accordingly, we conclude that appellant did not have a meaningful opportunity to defend himself before his termination was effective. In other words, the procedure in place created a risk that the District might erroneously deprive appellant of his property interest.

Gilbert decided the second factor against the plaintiff only because of the felony arrest. "We noted in *Loudermill* that the purpose of a pre-termination hearing is to determine 'whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action.' . . . By parity of reasoning, the purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay. . . . But here that has already been assured by the arrest and the filing of charges." (*Gilbert, supra*, 520 U.S. at p. 932.) Significantly, the District did not have the same type of reliable external indicia (the arrest) of the truth of the charges.

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[4] We note that section 87671 provides that a contract or regular employee may be dismissed if the employee has been evaluated. Absent from section 87671 is any requirement that a community college review (formally or informally) an employee's substantive defense prior to termination. That section provides: "A contract or regular employee may be dismissed or penalized if one or more of the grounds set forth in Section 87732 are present and the following are satisfied: [¶] (a) The employee has been evaluated in accordance with standards and procedures established in accordance with the provisions of this article. [¶] (b) The district governing board has received all statements of evaluation which considered the events for which dismissal or penalties may be imposed. [¶] (c) The district governing board has received recommendations of the superintendent of the district and, if the employee is working for a community college, the recommendations of the president of that community college. [¶] (d) The district governing board has considered the statements of evaluation and the recommendations in a lawful meeting of the board."

Loudermill is also instructive regarding the third factor. The *Loudermill* court concluded: "The governmental interest in immediate termination does not outweigh [the first two factors.] As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." (*Loudermill, supra*, 470 U.S. at pp. 542-544.)

Appellant was entitled to receive a pretermination hearing and did not receive one. Therefore, the judgment must be reversed. But even if appellant were not entitled to a pretermination hearing, we would still reverse. We would be compelled to conclude that the posttermination hearing and disposition were not sufficiently prompt in this factual context to satisfy due process.

Barry v. Barchi (1978) 443 U.S. 55 (*Barry*) is illustrative. In *Barry*, New York's racing and wagering board suspended the license of a harness race horse trainer without a presuspension hearing. The applicable statute did not specify a time for a post-suspension hearing, and it gave the racing and wagering board 30 days after conclusion of any such hearing to issue a ruling.

Although *Barry* concluded that the challenged presuspension procedures were satisfactory, that still left "unresolved how and when the adequacy of the grounds for suspension is ultimately to be determined. As the District Court found, the consequences to a trainer of even a temporary suspension can be severe; and we have held that the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.'

[Citation.] Here, the provision for an administrative hearing, neither on its face nor as applied in this case, assured a prompt proceeding and prompt disposition of the outstanding issues between Barchi and the State. Indeed, insofar as the statutory requirements are concerned, it is as likely as not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed. Yet, it is possible that Barchi's horse may not have been drugged and Barchi may not have been at fault at all. Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount, it seems to us. We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state-supervised horse racing. In these circumstances, it was necessary that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay. Because the statute as applied in this case was deficient in this respect, Barchi's suspension was constitutionally infirm under the Due Process Clause of the Fourteenth Amendment." (*Barry, supra*, 443 U.S. at p. 66.)

Furthermore, even though *Gilbert* sanctioned a demotion without a prior hearing, it stated: "Whether respondent was provided an adequately prompt post-suspension hearing in the present case is a separate question. Although the charges against respondent were dropped on September 1 (petitioners apparently learned of this on September 2), he did not receive any sort of hearing until September 18. Once the charges were dropped, the risk of erroneous deprivation increased substantially, and, as petitioners conceded at oral argument, there was likely value in holding a prompt hearing . . . . Compare [*FDIC v. Mallen* (1988) 486 U.S. 230,] 243 (holding that 90 days before the agency hears and decides the propriety of a suspension does not exceed the permissible limits where coupled with factors that minimize the risk of an erroneous deprivation). Because neither the Court of Appeals nor the District Court addressed

whether, under the particular facts of this case, petitioners violated due process by failing to provide a sufficiently prompt postsuspension hearing, we will not consider this issue in the first instance, but remand for consideration by the Court of Appeals." (*Gilbert, supra*, 520 U.S. at pp. 935-936.)

In this case, unlike in *Gilbert* and *Barry*, a pretermination hearing was required. That appellant did not receive a pretermination hearing is all the more reason why the posttermination proceedings should have been prompt. However, appellant had to wait over two months for his hearing and over seven months for the disposition. Under the circumstances, neither was prompt.

The District complains that the record is silent as to whether appellant sought to address the board on November 18, 1996, or whether appellant obtained an unidentified *Skelly* hearing prior to his administrative hearing. But these are nonissues. Even if appellant had attended the November 18, 1996, board meeting, *Skelly* would not be satisfied because that meeting occurred before appellant was given a copy of charges and notified that he had an opportunity to respond. If there was some other hearing that would satisfy *Skelly*, then it was incumbent upon the District to provide evidence of that below, and then refer to it on appeal. (See *People v. Sakelaris* (1957) 151 Cal.App.2d 758-759 ["On appeal, it is established . . . that no facts outside the record . . . can be considered").]

Additionally, the District argues in a footnote that the due process issue is not properly presented on appeal because appellant did not argue it to the administrative law judge. The District relies on *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429 (*Woodland Joint USD*). But the District's reliance is misplaced. In that case, the appellant claimed that his due process rights were violated when material in private files was admitted before the commission. The appellate court concluded that the appellant "waived this contention by failing to object to the material on this ground either before the Commission or in the trial court." (*Id*. at p. 1449.) *Woodland Joint USD* involved waiver of an evidentiary objection; it

does not hold that a terminated employee waives a *Skelly* objection by failing to assert it in a postdeprivation administrative hearing.

Regardless, even if there were law establishing that appellant *should* have raised his *Skelly* argument before the administrative law judge, we would not be foreclosed from considering it. First, appellant raised the issue in superior court and the District did not object. Second, an appellate court has the discretion to review an issue raised for the first time on appeal if it is a question of law on undisputed facts. (See *Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) Because the facts are undisputed, and because a constitutional issue is presented, we would decide the issue even if appellant did not raise it at his administrative hearing.

Having concluded that the District violated appellant's right to due process, we need not reach appellant's other contentions.

DISPOSITION

The judgment is reversed. The trial court shall issue a peremptory writ of mandate directing the District to set aside its decision to dismiss appellant. Appellant shall recover his costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
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