

1980 WL 121205 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 5, 1980

***1 SUBJECTO: Public Employees, Grievances, Academic Personnel.**

(1) Teaching faculty will not be deprived of any constitutional rights if they are exempted from the coverage of the State Employee Grievance Procedures Act.

Senator Heyward E. McDonald

QUESTION:

(1) Would it be constitutional to exempt the teaching faculty of state colleges and university from the coverage of the State Employee Grievance Procedures Act?

LEGAL AUTHORITIES:

Statutes: 1976 Code of Laws of South Carolina Sections 8-17-10, et seq., 8-11-230 and 59-107-10.

Constitutions: United States Constitution, Article 1, § 10 and Fourteenth Amendment. [South Carolina State Constitution Article I, §§ III and IV](#).

Regulations: State Budget and Control Board's, State Employee Rules Manual, Sections 7.03B, 7.04A, 7.04B and 7.09D.

United States Supreme Court Cases: [Fletcher v. Peck](#), 10 U.S. (6 Cranch) 187 (1810); [New Jersey v. Wilson](#), 11 U.S. (7 Cranch) 164 (1812); [Dartmouth College v. Woodward](#), 17 U.S. (4 Wheat) 518 (1819); [Colgate v. Harvey](#), 296 U.S. 404 (1935); [Indiana ex rel. Anderson v. Brand](#), 302 U.S. 95 (1935); [Dodge v. Board of Education](#), 302 U.S. 74 (1937); [McGowan v. Maryland](#), 366 U.S. 420 (1961); [The Board of Regents of State Colleges v. Roth](#), 408 U.S. 564 (1972); [Arnett v. Kennedy](#), 416 U.S. 134 (1974); and [Bishop v. Wood](#), 426 U.S. 341 (1976).

State Supreme Court Cases: [Gasque, Inc. v. Nates](#), 191 S.C. 271, 2 S.E.2d 36 (1938); [Parker v. Browne](#), 195 S.C. 35, 10 S.E.2d 625 (1940); [Broome v. Trulock](#), 270 S.C. 227, 241 S.E.2d 739 (1978); [State v. Smith](#), 271 S.C. 317, 247 S.E.2d 331 (1978); and [Hudson v. Zenith Engraving Company, Inc.](#), 273 S.C. 764, 259 S.E.2d 814 (1979).

Other legal authority: 67 C.J.S., [Officers](#), §§ 49 and 51, Novak, Rotunda & Young, [Constitutional Law](#), p. 495, and Sutherland, [Statutory Construction](#), § 67.02 at 219.

DISCUSSION:

You have asked this Office for its opinion concerning the constitutionality of a proposed amendment to the State Employee Grievance Procedures Act, Section 8-17-50, 1976, Code of Laws of South Carolina. If promulgated, the proposed amendment would terminate the jurisdiction of the State Employee Grievance Committee over the employment related grievances of 'all teaching faculty at state institutions of higher learning.' Such state institutions, listed in [Section 59-107-10, 1976, Code of Laws of South Carolina](#), as amended, are The University of South Carolina, Clemson University, The Citadel, The Medical University

of South Carolina, Winthrop College, South Carolina State College, Francis Marion College, Lander College, The College of Charleston, and the Technical Education Colleges and Centers. This opinion will discuss whether the amendment will violate the contract clause or deny equal protection and due process under the law to teaching faculty.

I

Equal Protection of the Laws

*2 The Fourteenth Amendment to the United States Constitution and [Article I, Section III](#) of the Constitution of the State of South Carolina require that all persons be afforded equal protection of the laws. Many cases which have been decided by the state and United States Supreme Courts have held that unless an inherently suspect classification, such as race, national origin or alienage, is made, the equal protection provisions are satisfied if the classification is reasonably related to the achievement of a legitimate state purpose and all the persons within such classification are treated alike under similar circumstances. See, e.g., [McGowan v. Maryland](#), 366 U.S. 420, 425 (1961); [Colgate v. Harvey](#), 296 U.S. 404, 423 (1935); [State v. Smith](#), 271 S.C. 317, 320, 247 S.E.2d 331, 332 (1978); [Broome v. Trulock](#), 270 S.C. 227, 230, 241 S.E.2d 739, 740 (1978); and [Gasque, Inc. v. Nates](#), 191 S.C. 271, 282, 2 S.E.2d 36, 41 (1938). Teaching faculty is not an inherently suspect classification. As long as all teaching faculty of state institutions of higher learning are denied access to the State Employee Grievance Committee, such exemption may be supported by reasons rationally related to the purpose of the State Employee's Grievance Procedures Act. This act was promulgated by the General Assembly to provide 'a proper forum for the understanding and resolution of employee grievances.' Section 8-17-10, 1976, Code of Laws of South Carolina. Since most state colleges^{al} and universities provide intra-agency grievance procedures which are unavailable to nonacademic staff members, the legislature may rationally restrict teaching faculty to the forums provided by their agencies.

II

Due Process of Law

The United States and State Constitutions protect citizens from being deprived of property or liberty without due process of law. Fourteenth Amendment to the United States Constitution and [Article I, Section III](#), Constitution of the State of South Carolina. As a general rule procedural laws do not give rise to substantive rights. One legal commentator states: Notwithstanding the oft-repeated insight of modern legal realism that claims of right are not very convincing unless there are remedies with which they can be enforced, it nevertheless is true that much legislation on the subject of court procedure, providing methods for establishing and enforcing substantive rights, has for its sole object the improvement of the system for administering substantive law and not the object of changing substantive law. Statutes on procedure have as their primary purpose the provision of expeditious means whereby someone who has a claim against someone else may apply for the assistance of government to enforce it, and the means whereby the other party, against whom the claim is made may interpose his defenses. Sutherland, [Statutory Construction](#), § 67.02 at 219.

The State Employee Grievance Procedures Act provides one forum whereby aggrieved permanent state employees^{aal} can vindicate their substantive rights which arise under the laws and regulations of the State.

*3 In [The Board of Regents of State Colleges v. Roth](#), 408 U.S. 564 (1972) the United States Supreme Court indicated what liberty and property rights are. The Court said that a liberty right: . . . denotes not merely Freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. [Id.](#) at 572.

In order for an employer to deprive an employee of a liberty interest protected by due process provisions, the employer's conduct must stigmatize the employee or must impose an impediment to the employee's obtaining other employment. [Id. at 573](#). Preventing teaching faculty from presenting grievances to the State Employee Grievance Committee will not reflect negatively upon the reputations of teaching faculty.

The Court defined property rights accordingly:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. [Id. at 577](#).

In order for teaching faculty to be deprived of a property interest protected by due process provisions, such employees must be deprived of fixed or certain benefits provided by state law. According to state law the right to present grievances to the Committee becomes vested in State employees at the end of a probationary period of employment. § 8-17-30, 1976, Code of Laws of South Carolina. One constitutional

If a person is hired for a government position which is clearly terminable at the will of his superiors the employed does not have a property interest in the position which mandates a fair procedure for determining the basis for his termination. If the government gives the employee assurances of continual employment or dismissal for only specified reasons, then there must be a fair procedure to protect the employee's interests when the government seeks to discharge him from the position. This entitlement also may come from statutory law, formal contract terms, or the actions of a supervisory person with authority to establish terms of employment.

*4 Nowak, Rotunda and Young, [Constitutional Law](#), p. 495 (Emphasis added).

The South Carolina State Supreme Court has recently upheld the long standing terminable-at-will doctrine with regard to private employment. See, [Hudson v. Zenith Engraving Company, Inc.](#), 273 S.C. 764, 259 S.E.2d 814 (1979). Terminable-at-will employment is not the general rule of public employment in South Carolina. Section 7.09D(2) of the Budget and Control Board's State Employee Personnel Manual provides: 'An agency head may dismiss any employee for just cause.' Since public employees are not terminable-at-will employees, a fair procedure, not necessarily one involving an appeal to the State Employee Grievance Committee, must exist to protect the permanent employee's property interest in public employment. ^{aaa1} Compare, [Bishop v. Wood](#), 426 U.S. 341, 345 (1976), wherein the United States Supreme Court said that since according to state law a public employee served at the pleasure of an appointing authority he necessarily has no property interests, with [Arnett v. Kennedy](#), 416 U.S. 134 (1974), wherein six United States Supreme Court justices said that since a public employee could be discharged for cause only, he had a property interest entitled to constitutional protection.'

III

Obligations of Contracts

[Article 1 § 4 of the State Constitution](#) and [Article I § 10](#) of the United States Constitution forbid state legislatures from enacting laws which impair obligations which arise from contracts. These constitutional provisions have been held to prevent a state from avoiding its responsibilities under a contract. [Dartmouth College v. Woodward](#), 17 U.S. (4 Wheat) 518 (1819); [New Jersey v. Wilson](#), 11 U.S. (7 Cranch) 164 (1812) and [Fletcher v. Peck](#), 10 U.S. (6 Cranch) 187 (1810). In determining whether

the constitutional provisions concerning the impairment of contracts would be violated, a legal analysis must first determine whether a contract exists in fact. [Indiana ex rel., Anderson v. Brand, 303 U.S. 95, 100 \(1935\)](#). Although it is possible for a state legislature to make a contract by statutory enactment, the intention of the legislature to make a contract must be made clear by the language of the statute. [Dodge v. Board of Education, 302 U.S. 74, 78 \(1937\)](#). One legal commentator states:

The employment relationship between a public agency and civil service employees does not arise out of, or result in, a contract between the parties, and the relationship of a civil service employee to a public agency is not contractual. The terms and conditions of civil service employment are not fixed by a contract between the public employer and an individual employee, but, . . . by the statute and regulations of the agency administering the civil service system. 67 C.J.S., [Officers](#) § 49, p. 326.

Since a civil service law is a statement of public policy rather than an offer of an contract of employment, it may be repealed. The legislature may modify any civil service rights which it had granted and it may adopt a new civil service system and terminate all rights acquired under the prior system. 67 C.J.S., [Officers](#) § 51, p. 329.

*5 Since there is no contract of employment for state employees, it is clear that there would be no impairment of contract rights by a statutory amendment to the State Employee Grievance Procedures Act. See [Parker v. Brown, 195 S.C. 35, 49-50, 10 S.E.2d 625, 631 \(1940\)](#).

CONCLUSION

For the reasons given, it is the opinion of this Office that teaching faculty of state institutions of higher learning may be exempted from the provisions of the State Employee Grievance Procedure Act. If such exemption is passed by the General Assembly, teaching faculty merely would be barred from presenting grievance appeals to the State Employee Grievance Committee. Teaching faculty who are permanent state employees would remain entitled to have access to some sort of due process hearing procedure in order to protect their property interests in their employment by a state agency. Moreover, in the absence of additional legislation, all teaching faculty would remain covered by the state personnel policy promulgated by the Budget and Control Board pursuant to [Section 8-11-230, 1976, Code of Laws of South Carolina](#).

Sincerely,

Barbara J. Hamilton
State Attorney

Footnotes

- [a1](#) The state technical schools, and perhaps other state institutions of higher learning, currently do not provide a grievance procedure other than the procedure required by the State Employee Grievance Procedure Act, Section 8-17-20, 1976, Code of Laws of South Carolina.
- [aa1](#) A permanent state employee normally attains 'permanent status upon completion of 6 months of satisfactory service.' State Budget and Control Board's State Employee Personnel Rules Manual § 7.04A. This probationary period 'may be extended up to a maximum of 3 additional months by the agency head if the employee has been given a marginal performance appraisal.' State Budget and Control Board's State Employee Personnel Rules Manual, § 7.04B.
- [aaa1](#) 'A new employee who does not have permanent status may be terminated at any time without the right to an appeal to the State Employee Grievance Committee when serving with probationary, temporary or emergency status.' State Budget and Control Board's State Employee Personnel Rules Manual § 7.03B.

1980 WL 121205 (S.C.A.G.)