

Terminating a Probationary Employee – *Loudermill* Analysis

Loudermill hearings (pre-termination meetings) are a procedural due process right given to employees facing having a property right (for purposes of our discussion in this article, their job) taken away. The right to a *Loudermill* hearing for certain public employees prior to terminating employment arises from the 14th Amendment to the United States Constitution due process clause “nor shall any state deprive any person of ... property without due process of law.”

The reference to “*Loudermill* rights” comes from the case *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) decided by the U.S. Supreme Court in 1985. The decision laid out that most public employees have a property interest in their jobs, and are therefore allowed due process rights if their employment will be terminated. *Loudermill* rights include a notice, usually provided in writing, stating the reasons why termination of employment is being considered. Specific evidence describing any charges against the employee must be provided. Additionally, a pre-termination hearing is offered, during which the employee can respond to the charges.

Without some contractual or other specially created right, public employment on its own does not create constitutionally protected property interests in continued employment, and therefore, employees would have no right to due process. However, where a contract, policy, or statutorily required process limits the public employer’s right to terminate employees at-will, constitutional requirements apply. Non-probationary public employees who have such a protection are entitled to due process prior to the termination of their employment, because they have a protected property right to their position of employment.

Probationary employees typically have not yet attained a property right in their job, as they are still within the extended selection process during which the employer is evaluating their suitability for regular status employment. This is the very reason for having a probationary period. Therefore, the requirement to due process provided through a *Loudermill* hearing is typically **not required** prior to termination of employment during a new hire probationary period.

If an employer is considering terminating a probationary employee without providing a *Loudermill* hearing, there are several considerations that should be carefully reviewed.

First, review applicable policy or collective bargaining agreement. Be certain the county is clear on probationary or at-will employment provisions and follows its own applicable policy or contract. Confirm that the employee is still within the timeline of their probationary period, and that the human resources department is not being presented with a situation where the last day of probation slipped by, but the supervisor never officially “passed” the individual on probation. If the probationary timeframe and end-of-probation date as defined by county policy or union contract has passed, then the county should provide the *Loudermill* hearing (and Veteran’s Preference hearing rights, if applicable).

Review employment history with the county to ensure the employee is truly under a new hire probationary period. An individual who previously completed an initial new hire probationary period in a different position for the county employer, and was only recently promoted, demoted, or transferred to a *different* position in the organization, may have property rights to county employment. (In addition, Veteran’s Preference rights **do** apply once an individual has completed their *initial* new hire probationary period, even if the employer typically places promoted employees “on probation” in their

newly attained position.) Be certain to differentiate between the true initial new hire probationary period and any subsequent “probation” applied upon promotion or other job change during continuous county employment.

Have Your Authority at the Ready

Review the collective bargaining agreement and personnel policies. Look for language that says the probationary employee does not have "regular" (or “permanent”) status. Check the definitions section, as well as sections on recruitment, and employment status, for likely areas where guiding language may be incorporated. The county’s policies and collective bargaining agreements typically contain provisions regarding probationary periods, and these sections are important to review as you determine the steps to take in the termination process.

Additional tips on what to look for in policies and collective bargaining agreements:

- Is there any language regarding what’s different about a "probationary period"?
- Is there language addressing the "at will" nature of the employment relationship during the probationary period?
- Is there language stating that **after** passing probation an employee attains "regular" (or “permanent”) status?
- Is there language stating that a probationary employee can be terminated at any time?
- Is anything objective written in a mid-probation check-in or end-of-probation evaluation?
- Are there provisions specifically defining the duration and terms of the probationary period?

Not Required – But Still Worth Considering?

While we have established that due process including a pre-termination *Loudermill* hearing is *not required* in many cases for probationary employees, some county employers still choose to offer the *Loudermill* hearing or a similar pre-termination meeting. The *Loudermill*, or pre-termination meeting, serves as opportunity for an employee to provide exonerating or mitigating information prior to disciplinary action being imposed, when that disciplinary action impacts income (this may include unpaid suspensions, demotions, and termination of employment). It provides the option for an employee to present their information and perspective on the issue(s) of concern before adverse action is taken. The *Loudermill* can provide the employer additional information that may protect against mistaken decisions. Some employers view providing the *Loudermill* hearing as a best practice to gather any additional information available prior to making a final decision to end employment, including in the case of probationary employees.

Even when the employer does not provide a formal *Loudermill* hearing in the case of probationary employee termination proceedings, demonstrating a willingness to hear the employee's side of the situation if additional information is presented is still prudent in case there's been some misunderstanding, inaccurate information, or protected class issues are coming into play. Having a record of listening to the employee's version of events can go a long way in demonstrating the employer was reasonable in its termination procedures and decision, if later faced with a discrimination or retaliation claim.

When the employer opts to incorporate a *Loudermill* hearing prior to making a final decision about terminating an individual’s employment, it is good to have at least one day built in between the

employee presenting information for consideration at the *Loudermill* hearing, and the final determination being delivered. If new information is brought forward, there is a natural window in the process during which decision makers can research, verify or gather facts if needed.

If the employer has opted to terminate employment without offering the *Loudermill* process for probationary employees, there is some chance an employee may share new or additional information at the termination meeting. Ideally, the facts and circumstances should be well-researched and deemed solid prior to initiating proceedings to terminate a probationary employee, but in the event new information is shared that requires further consideration or verification prior to terminating employment, the employer may opt to halt the termination proceeding. If during the termination meeting the employer is suddenly faced with information that requires time to sort through, placing the employee on a paid administrative leave is one approach to consider. Then verify or gather necessary information to ensure the county makes an informed final determination.

While the chance of surprise information being shared at the termination meeting is significantly reduced by offering a *Loudermill* hearing as part of the county's routine process, including for probationary employees, some counties opt to apply the *Loudermill* only when it is required. The process leading up to termination can be more drawn out when a formal *Loudermill* hearing is incorporated, additional resources must be committed to seeing it through procedural steps, and at times there are disadvantages to delaying closure for the parties involved. Each county should consider their organizational culture, risk tolerance, resources, overall desired approach, as well as the specific facts and circumstances of each case when considering process for separation of probationary employees from county service.