Denver Law Review

Volume 33 | Issue 6 Article 6

May 2021

Federal Loyalty Program & (and) Procedure

Everett Ellsworth Smith

FEDERAL LOYALTY PROGRAM & PROCEDURE:

ACCUSED EMPLOYEES' RIGHT TO CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES; NECESSITY OF EVIDENCE; NECESSITY OF WITNESSES TAKING OATH

BY EVERETT ELLSWORTH SMITH

Everett E. Smith: admitted to the Minnesota bar in 1933; practised law in Minneapolis, Washington, D. C., and Kansas City; former appellate counsel in Denver for the Internal Revenue Service; former Assistant Judge Advocate of the Third Army in Europe; private practice in Denver since 1954.

The case of *Peters v. Hobby*, 349 U. S. 331, 75 S. Ct. 790 (1955), is perhaps more notable for the issues left undecided than those passed upon. Dr. John J. Peters, an eminent professor of medicine, had been for some years a special consultant in the United States Public Health Service. Compensation was at a specified rate per diem for days actually worked, i. e., from four to ten days per year when called upon by the Surgeon General. After the appropriate agency board several times had considered the question of Dr. Peters' loyalty to the Government of the United States and decided the question favorably to the employee, the Loyalty Review Board in April, 1953 decided upon its own motion to look into the matter *de novo*.

At the hearing held by a panel of the Review Board in May, 1953, the only testimony offered was that in favor of the federal employee. According to the opinion of the Supreme Court, however, the record before the Review Board also "contained information supplied by informants whose identity was not disclosed to petitioner," the employee. "The identity of one or more, but not all, of these informants was known to the Board. The information given by such informants had not been given under oath." On the record before it, the Review Board found a reasonable doubt of Dr. Peters' loyalty and purported to bar him from federal employment for three years.

In the employee's suit for a declaratory judgment holding that

his removal and debarment from employment was invalid, the District Court for the District of Columbia granted the respondent's motion for judgment on the pleadings. The Court of Appeals affirmed, with one judge dissenting, in reliance on *Bailey v. Richardson,* 182 F. 2d 46 (App. D. C., 1950), affirmed by an equally divided vote, 341 U. S. 918, 71 S. Ct. 669 (1951).

The Supreme Court reversed the judgment given below in the instant case. The Court decided that the petitioner was entitled to a declaratory judgment that his removal and debarment were invalid. The invalidity, according to a majority of the Court, lay in the Review Board's acting on its own motion without a referral of the case to it by either the employee or the agency board. The Presidential Order providing for the Loyalty Review Board conferred no authority upon the Review Board to proceed upon its own motion as it had done. Three of the justices of the Court dissented from this ground of the Court's holding.

In his concurring opinion, Mr. Justice Black questioned whether the Presidential Order establishing the loyalty program was authorized. Mr. Justice Douglas, concurring only in the Court's decision to reverse the judgment below, said (at pages 350-351):

> Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.

Mr. Justice Douglas went on to add that in his opinion the decision of the Review Board deprived Dr. Peters of the liberty or right to work, in violation of the "due process" clause, and perhaps under the circumstances amounted to an unconstitutional equivalent of a bill of attainder.

Language similar to that of Mr. Justice Douglas was used in the majority opinion in *Parker v. Lester,* 227 F. 2d 708 (CA-9, 1955), which case decided that merchant seamen are entitled to "due process;" were not given it by the security-screening regulations applicable to them; and that the enforcement of the regulations should be enjoined. In that case, the Court of Appeals had no occasion to decide and did not purport to decide whether a government employee is entitled to "due process" before (a) he is branded as disloyal and (b) dismissed from employment. Assuming that the general right to work involved in *Parker v. Lester* does not include the specific liberty to work for the government, does the "due process" clause of the Fifth Amendment protect against the arbitrary and unreasonable imposition of the badge of infamy, the finding of disloyalty?

Although the Supreme Court had granted certiorari "because the case appeared to present the same constitutional question left unresolved" by the *Bailey* case, supra, the majority of the Court explicitly declined, in view of the alternative ground of decision available, to consider a constitutional issue. As matters stand, therefore, the constitutionality of a board's deciding an issue of employee loyalty according to the procedures followed by the Review Board in the *Peters* case remains to be cleared up. To express it differently, the Court of Appeals for the District of Columbia twice has held the Constitution gives no protection, but the Supreme Court has not spoken.

If the handiwork of the Founding Fathers does not save their descendants from the type of procedure described in the above-quoted language of Mr. Justice Douglas, there nevertheless appears to be nothing in the Constitution to forbid its present-day beneficiaries from devising procedures which provide the rudiments of a fair hearing to federal employees. To speak of the legality only, the eighteenth-century doctrine of "due process" embodied in the Fifth Amendment may be supplemented by a twentieth-century legislative or executive prescription of "fair process" involving an employee's right to confront and cross-examine any informants willing to be sworn and testify against him under such circumstances.

As for the judiciary, it is at least doubtful whether it should develop a doctrine of "fair process" if the coordinate branches of government fail to make such a prescription. In any event, on the basis of existing legal doctrines, there appears to be no authority for court relief against administrative judgments of disloyalty and dismissal which provide scant notice, have no support in evidence and permit no confrontation or which (about the same thing) are "based" on undisclosed or vaguely disclosed charges of faceless informers unless (a) there happens to be an irregularity in the administrative proceedings as in the *Peters* case or (b) the "due process" clause or other constitutional protection is available in the circumstances.

Beyond the ken of the courts and the scope of this note are certain questions of policy rather than law, such as: Is the fair treatment of public employees, whether in sensitive or non-sensitive positions, as consistent with the public safety and security as the determination of "loyalty" by methods such as employed by the Review Board in the *Peters* case? If not, can fair treatment of the individual employee (itself a public demand) be made reasonably consistent with such other, supposedly conflicting, public demands as safety and security?