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Dunlavey v. Berenguer

414 U.S. 895 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 11, 1973

Re: 72-1519 - Dunleavey v. Berenguer

Dear Bill:

I can join in your proposed disposition a la Munsingwear.

Regards,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 11, 1973

72-1519 - Dunleavey v. Berenguer

Dear Bill,

I could join an order in this case that would grant, vacate, and remand for dismissal citing Munsingwear.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 11, 1973

Dear Bill:

Re: No. 72-1519 - Dunlavey v. Berenguer

I could go along with your suggestion and note, vacate and remand on the Munsingwear formula.

Sincerely,

Harry

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 11, 1973

No. 72-1519 Dunleavey v. Berenguer

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 10, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 72-1519 - Dunleavey v. Berenguer

I agreed at Conference last week to explore the question of whether this case was or might be moot. I find myself sufficiently confused that I think it best to set out the facts at some length.

In the mid-sixties, Delaware by law conferred upon its civil service employees the right to organize and bargain, and a merit system of personnel administration. Included within the latter were a form of modified tenure, the right to receive reasons for dismissal or probation, and other rights with respect to working conditions. 19 Del. Code §§ 1301-12.

In 1972, the Delaware General Assembly, apparently unhappy with the performance of the Probation and Parole Section of the Delaware Division of Adult Corrections, enacted legislation calling for a complete reorganization of that section "including dismissals, replacements, transfers, hirings and new management", and suspended for a one-year period, ending July 1, 1973, the above cited sections of the Delaware Code with respect to these employees. Del. House Bill No. 676, §§ 1, 33; 58 Del. Laws Ch. 484 (1972).

Pursuant to this legislation, appellant notified appellees, who were employees of the Probation and Parole

Section, that they were being either summarily discharged or placed on probation, effective September 8, 1972. Appellees sought declaratory and injunctive relief in the United States District Court for the District of Delaware, seeking to have the legislation in question declared unconstitutional as a denial of the equal protection of the laws under the Fourteenth Amendment.

On September 5, 1972, a single district judge held a hearing upon application for a temporary restraining order, and issued such an order enjoining the state from acting under the new statute. A subsequent order denying the state's motion for reargument on September 11, 1972, makes it clear that the temporary restraining order prevented the dismissals of the individual plaintiffs from taking effect as scheduled on September 8, 1972. The TRO did include, however, a statement that "nothing herein contained prohibits the defendant from taking any appropriate action to dismiss the plaintiffs or any members of the class provided such actions are taken under the provisions of the merit system as it existed prior to the enactment of section 33 of House Bill 676."

On September 11, 1972, the Director of the Division of Adult Corrections issued an order to the staff indicating that due to the issuance of the temporary restraining order, the merit system rules would remain in effect. Three of the individual appellees, Berenguer, Tarkenton, and Robb, received on that day letters notifying them of their dismissals effective September 14, 1972; the letters set forth reasons for their dismissal.

Appellees then made a motion in the District Court for reargument and to amend the TRO, alleging that the September 14, 1972 dismissals of the three violated the existing merit

system in that certain administrative procedures governing the disciplining of merit system employees had not been followed. In response, the state argued that merit system procedures had been followed. These arguments were presented by both parties in the formal briefs to the three-judge court; the state also contended in a reply brief that the appellees lacked standing to sue because they had been dismissed under the merit system, and not under the one-year suspension act, and were therefore not entitled to challenge the one-year suspension act.

The only reference to these facts in the opinions below is in a footnote to the opinion of the dissenting judge, appellant's A 53:

> "It was asserted at argument that certain of the plaintiffs were later dismissed pursuant to the provisions of the merit system. It does not appear of record, however, what procedures were followed in these dismissals and I am, therefore, unable to conclude that these employees were properly terminated from employment thus rendering their present claims of injury moot."

With respect to at least three of the appellees -- Berenguer, Tarkenton, and Robb -- there appears to be a continuing dispute between them and the state, but it is not about the validity or enforceability of the one-year suspension act. Instead it is whether the state complied with the provisions of the merit system act in effectuating their dismissal. While the state would have dismissed them summarily under the suspension act if the District Court's injunction had not prevented it from doing so, the suspension act has now expired (as of July 1, 1973) and presents no threat of dismissal to anyone.

In addition to the three appellees named above, Flavio Trujillo and George Sharp were also named parties to the action below. The record is silent as to any effort on the part of the state to dismiss them through normal merit system procedures; since the temporary restraining order went into effect before the state's initial notices of dismissal could take effect, and has remained in effect in permanent injunction until the present time, there could have been no summary dismissals under the one-year suspension act. Had the act not been so limited in time, the appellees, who are presently arguing that their dismissals did not comport with merit system procedures, might be faced with the prospect that if the District Court's injunctive order were vacated, the state might then take the position that it need not comply with those procedures, since the suspension act authorized summary dismissal. But since the injunction came into effect before the first of the dismissals sought by the state, and outlived the life of the suspension act, the state may no longer avail itself of the latter.

In summary, the law which appellees successfully challenged in the District Court has expired as a result of the passage of time, and a reversal here in the event probable jurisdiction were noted would not have the slightest effect on either appellant or appellees. Because of the somewhat unsettled factual contentions of the parties, I had originally thought that a remand for consideration of mootness along the lines of Indiana Employment Division v. Burney, 409 U.S. 540 (1973) would be proper. I am now inclined to the view that the factual disputes do not bear on the issue of mootness, that the case has become moot by the expiration of the suspension act, and that we should grant, vacate, and remand for dismissal citing Munsingwear.

W.H.R.