



*Loudermill* FAQ:  
Public Employee  
Rights to a Hearing  
Prior to Termination

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## Frequently Asked Questions on Loudermill and Public Employee Rights to a Hearing Prior to Termination

You are probably familiar with the principle that the government may not deprive someone of “life, liberty or property” without due process. When we think of property, we often think of real property, such as a house, or assets, such as our income. But what about someone’s job? Do employees have a property interest in their employment, and if so, can they be terminated or demoted? According to multiple court cases, some government employees do indeed have property interests in their employment. For those employees, certain procedural protections must be met before they may be terminated, suspended, or demoted. Those procedural protections are commonly referred to as “*Loudermill* hearings.”

In *Cleveland Board of Education v. Loudermill*,<sup>1</sup> the U.S. Supreme Court held that prior to being terminated, a public employee who has a constitutionally-protected interest in their job must be given notice of any charges, an explanation of the employer’s evidence, and an opportunity for a hearing to present the employee’s side of the story. This FAQ answers some basic questions regarding public employee rights, due process and the *Loudermill* hearing process.

Please note that the following information is meant only to provide a general foundation for understanding the topic. The League encourages its members to consult legal counsel and CIS (Citycounty Insurance Services) with further questions.

### **1. Do all Public Employees have a Protected Property Interest in Employment?**

No, not all public employees have a constitutionally-protected property interest in employment. According to the courts, whether a public employee has a property interest in their employment depends on whether that employee has a legitimate expectation of continued employment. An expectation of continued employment can derive from several sources. For example, a public university professor may have an expectation of continued employment through the university’s tenure system.<sup>2</sup> Similarly, an elementary school teacher may have an expectation of continued employment based on state laws that create a “civil service” system.<sup>3</sup> In other circumstances, collective bargaining agreements or other established practices may create a *de facto* tenure system.<sup>4</sup> Not all public employees have a property interest in continued employment, however. Employees who are terminable at will generally have no protected property interest in continued

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<sup>1</sup> 470 US 532 (1985).

<sup>2</sup> *Slochower v. Board of Higher Education*, 350 US 551 (1956).

<sup>3</sup> *Giedra v. Mt. Adams School District No. 209*, 126 Wash. App. 840 (2005).

<sup>4</sup> *Perry v. Sinderman*, 408 US 593 (1972).

employment.<sup>5</sup> The *Loudermill* hearing process is only required for those employees who have protected property interests in continued employment.

## **2. Does *Loudermill* Apply to Private Sector Employees?**

No. Even assuming private sector employees have a property interest in their employment, the due process clauses of the Fifth and Fourteenth Amendments only apply to government conduct. Private employers are not required to follow the same due process procedures when terminating, suspending or demoting employees.

## **3. Does *Loudermill* Apply when a Public Employee Resigns?**

No. A public employer does not need to provide procedural due process to employees who resign because the government has not initiated a deprivation of a property right.

## **4. What Laws Determine Whether a Public Employee has a Protected Property Interest?**

The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the government from depriving a person of life, liberty, or property without due process. At a minimum, due process requires the government to provide someone with notice and a hearing prior to a deprivation of a protected property interest.<sup>6</sup> The question then becomes, what laws determine whether a person has a property interest? Property interests do not derive directly from the federal constitution, but rather from state and local law.<sup>7</sup>

Because some public employees have a protected property interest in their employment, the government must comply with due process before terminating, demoting, or suspending those employees. Public employees who have protected property interests in their employment are entitled to, at a minimum, pre-termination notice of the charges, an explanation of the employer's evidence, and an opportunity to explain the employee's side of the story.<sup>8</sup>

## **5. Does *Loudermill* Require Specific Procedures before Terminating, Suspending or Demoting a Public Employee?**

As noted above, because certain public employees have a property interest in their employment, the government (*i.e.*, the employer) may not terminate those employees without giving them notice and an opportunity to respond. The hearing at which an employee can explain their side of the story is generally called "*Loudermill* hearing."

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<sup>5</sup> *Bishop v. Wood*, 426 US 341 (1976).

<sup>6</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306 (1950).

<sup>7</sup> *Board of Regents v. Roth*, 408 US 564 (1972).

<sup>8</sup> *Loudermill*, 470 US at 546.

Although *Loudermill* held that a pretermination hearing was constitutionally required before a public employee could legally be terminated, however, the court did not prescribe any specific requirements for the hearing. Instead, the court stated that the hearing must give the employee “an opportunity to respond,” and concluded that “something less” than a full evidentiary hearing would satisfy due process.<sup>9</sup>

The Oregon Supreme Court has interpreted *Loudermill* as requiring, at a minimum, the following procedural safeguards before termination: (1) notice of the charges; (2) notice of the kinds of sanctions being considered; and (3) “an informal opportunity to refute the charges either orally or in writing before someone who [is] authorized either to make the final decision or to recommend what final decision should be made.”<sup>10</sup> Note, however, that the Oregon courts agree that due process does not require a full evidentiary hearing.<sup>11</sup>

Again, as noted above, whether an employer must provide an employee with those procedural safeguards prior to termination depends on whether the employee has a protected property interest in their job. And, whether the employee has a protected property interest in their job depends on state and local law.

## **6. What Constitutes Sufficient Notice of the Charges?**

Under Oregon law, notice to the affected employee must include information that is “sufficiently specific” to permit the employee to understand the precise charges, so that they can prepare a proper defense.<sup>12</sup> Sufficient notice, however, does not mean that the employer must provide all relevant documents to the employee prior to the hearing. The courts will generally defer to the employer to craft their own means of providing notice, so long as the notice meets due process.

## **7. Can an Employer Simply Conduct an Investigatory Interview Instead of Holding a Hearing?**

No. Even if the employee has an opportunity to provide an explanation or mitigating circumstances during an investigatory interview, the interview alone does *not* satisfy due process. The courts have explained that investigatory interviews do not provide employees with sufficient opportunity to respond to official charges and thus do not meet minimum constitutional requirements. However, employees have the option of choosing to submit a written response to the employer’s allegations, rather than attending the *Loudermill* hearing.

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<sup>9</sup> *Id.*

<sup>10</sup> *Tupper v. Fairview Hosp. & Training Center, Mental Health Div.*, 276 Or 657 (1976).

<sup>11</sup> *Hammer v. Oregon State Penitentiary, Corrections Div.*, 283 Or 369, 375 (1978).

<sup>12</sup> *State ex rel. Currin v. Commission on Judicial Fitness & Disability*, 311 Or 530, 532 (1991).

## **8. What if an Employee Declines to Participate in a Hearing?**

Employees are not required to participate or cooperate in *Loudermill* hearings. The courts have determined that when an employee is offered the opportunity to respond to allegations but refuses to participate in a hearing, the employee has been afforded all the due process that is constitutionally required.<sup>13</sup>

## **9. Even if the Law does not Require a Public Employer to Give a *Loudermill* Hearing to an Employee, are there Good Reasons to do so?**

Yes. As noted above, *Loudermill* hearings are required before terminating, demoting or suspending employees who have a property interest in their employment. There are good reasons, however, to conduct *Loudermill* hearings with all employees prior to termination, demotion or suspension, regardless of whether the employee has a property interest in employment. First, it is not always clear when an employee has a property interest in their employment, and granting all employees *Loudermill* hearings reduces the risk that an employer might deprive an employee of a property interest without due process. Second, if an employer is faced with an employment lawsuit, defending the decision to terminate, demote or suspend an employee is much easier if the employer gave the employee a hearing and the opportunity to respond, even if the employer was not required to do so.

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<sup>13</sup> See *Heath v. Redbud Hosp. Dist.*, 620 F2d 207, 212 (9th Cir 1980); *Miller v. Williams*, 590 F2d 317, 321 (9th Cir 1979).