




Name-Clearing Hearings . . . Cleared Up

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AGENDA


- When Failure Becomes Costly: The Economic Consequences of Failing to Provide a Name-Clearing Hearing
- A “Little” Legal Discussion
- Elements of Name-Clearing Hearing Claims
- Best Practices for Providing Name-Clearing Hearings

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**The Economic Consequences
of Failing to Provide a
Name-Clearing Hearing**

When Failure Becomes Costly



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Economic Consequences

Employees who prevail on denial of name-clearing hearing claims are entitled to:

- Nominal damages (always)
- Compensatory damages (when an actual injury occurred from the deprivation)
 - Includes loss of employment prospects and actual job opportunities.
 - Can mean emotional distress damages and back pay.
- Attorney fees (ouch)



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Economic Consequences

- Fetsch v. City of Roseburg (2013)
 - Jury awards former police sergeant \$750,000 plus attorney fees



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A “Little” Legal Discussion



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Property Interests v. Liberty Interests

- Public employees have both, thanks to the Fourteenth Amendment
 - Property interest in employment
 - Liberty interest in reputation (and future employment)



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Property Interests v. Liberty Interests

Public employees have “Due Process” rights that all CIS members must honor:

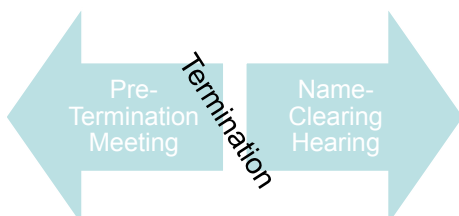
- Before a public employee is fired for “just cause” (property interest)
- Before a government employer takes actions that hurt a former employee’s reputation (liberty interest)



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Property Interests v. Liberty Interests



Property Interest
(sometimes referred to as “Loudermill Hearings”)

Liberty Interest



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One Last (Non-Legal) Issue

Terminology Used in Today's Speech

- "NCH" = name-clearing hearing
- "Liberty Interest Hearing" = name-clearing hearing



Elements of Name-Clearing Hearing Claims



Elements

1. A government employer
2. Makes a public disclosure of "stigmatizing" (*i.e.*, really bad) information about an employee
3. The employee disputes that he or she did anything really bad
4. The public disclosure is made in connection with the termination of employment



What is a “public disclosure”?

- Responding to a public records request
- Responding to requests from the media
- Telling someone outside of the employer-employee relationship about the employee’s “bad acts”
 - Includes negative references to prospective employers
- Placing a termination document in an employee’s personnel file? Probably not.



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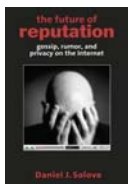
What is NOT a “public disclosure”?

- Responding to a request for information from the DPSST
- Responding to a request for information from the Department of Employment (unemployment)
- Communications made in the course of a lawsuit



What is NOT a “public disclosure”?

- Defamatory comments by non-employees, even if made in a public forum
- A former employee’s self-publication of the stigmatizing information



What is “stigmatizing” or “really bad” information?

- In practical terms, the really bad information must have the effect of making it impossible for the employee to get another job.
 - But NOT just public employment in the position the former employee held at the time of the termination.



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What is “stigmatizing” or “really bad” information?

- “Stigmatizing” information is something that imposes a stigma on a person or seriously damages “his standing and associations in his community.”
 - Includes dishonest or immoral acts
 - Real-life example: Dishonesty, such as on an application or benefits form
 - Real-life example: Taking drugs, engaging in prostitution, or other forms of “moral turpitude”



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What is “stigmatizing” or “really bad” information?

Other examples of potentially stigmatizing information:

- Committing a crime (regardless of arrest or conviction status)
- Harassing or discriminating against other employees because of their protected class status
- Unethical use of government position to obtain bribes, gifts, or special privileges
- Embezzlement from the organization



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What is “stigmatizing” or “really bad” information?

- What if the “disclosure” doesn’t name the employee?
 - *Close, but no cigar!* The surrounding circumstances could still make clear who the employer is talking about.
 - For example, releasing information that an employee was terminated at the same time another entity announces a criminal investigation = likely “stigmatizing”



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What is **NOT** “stigmatizing” or “really bad” information?

Poor Performance Issues:

- Being tardy, excessively absent without excuse, failing to schedule leave
- Roughhousing at work, possibly bullying
- Failing to satisfy performance standards
- Failing to submit required documentation of certifications or licensure



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What is **NOT** “stigmatizing” or “really bad” information?

Poor Performance Issues (cont'd):

- A mere inability to meet an employer's expectations (including incompetence)
- Discharge for disputing the authority of a supervisor
- Poor management skills



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When is a Public Disclosure Made “in Connection With” a Termination?

- **General Rule:** The disclosure must have been made close in time to the termination or other significant employment action.
 - Meaning: [This spot intentionally left blank.]
- **CIS Recommendation:** Up to a year, but advice will turn on whether the former employee remains unemployed.



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Sounds like we're going to get hammered if we disclose when an employee does something bad.

But if we don't, aren't we "passing the trash"?!



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Best Practices for Providing Name-Clearing Hearings



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NCHs in General

- **Sole purpose:** To permit the person the opportunity to publicly clear his/her name
- The hearing is the only remedy.
 - Not an opportunity to seek reinstatement or reconsideration of a termination decision
- The NCH is just that, a hear-ing.
 - The former employee speaks, you listen. They don't get to have a mini-trial.



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NCHs: The Employer's Primary Goals

- Give the employee:
 - Notice of an impending "public disclosure"
 - An offer of a NCH
 - A reasonable time to prepare for the NCH
 - The right to have counsel present
 - The opportunity to present witnesses and evidence
 - The opportunity to have the hearing in front of the applicable body or other representative of the decision-maker in a public forum.



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NCH: The Employer's Offer

- The employee is not required to request the NCH!
- **CIS Guidance:** The employer should offer a NCH before a public disclosure.
 - Do not wait for a request from the former employee or his/her attorney (or union).
 - Do not ignore requests from the former employee, his or her attorney, either.



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Extending a NCH "Invitation"

- Send something in writing to the employee *before* there is a disclosure. Contents:
 - A disclosure of *potentially* stigmatizing information is going to occur.
 - Offer the NCH and suggest times that are before or near the same time as the public disclosure.



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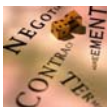


Extending a NCH "Invitation"

- Use the NCH offer letter to get "buy in" from the former employee:
 - Try to negotiate the hearings process and then agree in writing that whatever they come up with, in their opinions, meets the requirements of due process of law, and that the employee agrees not to later contend otherwise.
 - If they won't agree, present reasonable terms as a take-it-or-leave-it proposition.



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Possible NCH Negotiation Issues

CIS Guidance on Format of Hearing:

- Meeting should be open unless former employee requests executive session.
- Establish, up front, who will attend the hearing on behalf of the organization.
- Schedule no more than two hours for the hearing, and advise the employee.
- Record the hearing or have a reliable method for recording what is said.



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Possible NCH Negotiation Issues

CIS Guidance on Format of Hearing (cont'd)

- No one who attends the hearing is placed under oath.
- No one who attends the hearing is cross-examined.
- Employer will not present evidence or “respond” to the information presented by the employee
 - Listen (and bite your tongue).



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Possible NCH Negotiation Issues

CIS Guidance on Format of Hearing (cont'd)

- Allow the former employee to present whatever evidence they want, but limit it to the issue at hand: The basis for the termination decision.
 - Documents are always acceptable.
 - To keep the amount of time spent at the hearing reasonable, consider having witnesses present their “testimony” via written statements.
 - OK to have one or two witnesses present live “testimony” on behalf of the former employee.



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Possible NCH Negotiation Issues

CIS Guidance re Format of Hearing (cont'd)

- What if the employee wants his or her attorney to be present?
 - You likely have to allow this, and there may be strategic reasons to do so.



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Arbitrations and NCHs

What if the employee files a grievance and has an arbitration regarding his termination? Is that enough to satisfy NCH due process requirements?

- Maybe, but helpful legal authority on the subject is lacking.



The NCH Has Happened – Now What?

- Valid, unanswered question!
- If it's a public proceeding, there is probably nothing else to do.
- Consider providing the former employee's evidence or a copy of the recording with the public disclosure (but get consent from the former employee to do so).
- At a minimum, maintain a record.



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If you remember nothing else from today's presentation, remember this:


When in doubt

Hear them out

(provide the name-clearing hearing)




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Questions?

“... you can either
ask the question
or
experience the answer ...”

- Author unknown
(source: <http://www.gaia.com/quotes/topics/questions>)

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THANK YOU!

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