

The Parratt-Hudson Doctrine revisited

By Kevin F. Moloney
and Roger T. Manwaring



MOLONEY



MANWARING

State, county and municipal governments are often sued by former employees who claim to have been fired without a hearing or other procedural safeguards. Where the former employee has worked for long enough to attain civil servant or other tenured status, and hence a property interest in expected continued employment, such claims take on a constitutional dimension because the federal constitution prohibits the taking of life, liberty or property without due process of law.

Due process usually requires that a public employer provide such a civil servant a hearing prior to terminating his or her employment (Gilbert v. Homar, 520 U.S. 924, 929 (1997); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985)), and the civil service laws require a pre-termination hearing. See e.g. G.L.c. 35, §51. Therefore, if the public employer denies a civil servant the requisite pre-termination hearing, the civil servant may have a claim for damages under 42 U.S.C. §1983 (a "§1983 action") based on a violation of his or her procedural due process constitutional rights.

However, a public employer accused of a procedural due process violation has an important defense in the so-called Parratt-Hudson Doctrine. Under that rule, if a deprivation of property (e.g. the termination of a civil servant's employment) "is occasioned by random and unautho-

ried conduct by state [or municipal] officials," then no pre-deprivation hearing is required and due process is satisfied if "adequate post-deprivation remedies" are provided (O'Neill v. Baker, 210 F.3d 41, 50 (1st Cir. 2000), quoting Lowe v. Scott, 959 F.2d 323, 340 (1st Cir. 1992)).

The 1st U.S. Circuit Court of Appeals recently applied the Parratt-Hudson Doctrine in Hadfield v. McDonough, 407 F.3d 11 (1st Cir. 2005), cert. denied, 546 U.S. 961 (2005), in which the sheriff of Plymouth County defeated claims that he had violated the first amendment rights of certain deputy sheriffs and an assistant deputy superintendent by terminating them on the basis of their political beliefs and had violated the due process rights of the ADS, who claimed to have tenured status, by failing to provide a pre-termination hearing.

Prior to trial, the lower court dismissed the claims of the ADS and he appealed only the due process issue after the jury at trial found for the sheriff on all other counts. Holding that there had been no procedural due process violation, the Hadfield court explained that "the Parratt-Hudson doctrine shields a public entity from a federal due process claim where the denial of process was caused by the random and unauthorized conduct of government officials and where the state has provided adequate post-deprivation remedies to correct the officials' random and unauthorized acts." (407 F.3d at 19-20.)

Stated another way: "Parratt and Hudson preclude §1983 claims for the 'random and unauthorized' conduct of state officials because the state cannot 'anticipate and control such conduct in advance.' In addition, unauthorized deprivations of property by state employees do not constitute due process violations under the Fourteenth Amendment so long as meaningful post-deprivation remedies are available." (Brown v. Hot, Sexy and Safer Products Inc., 68 F.3d 525, 535 (1st Cir. 1995)).

While simple in its formulation, the Parratt-Hudson Doctrine raises numerous thorny problems in its application, among them the question what type of conduct by a public official is "random and unauthorized."

For example, is a public official's conduct "unauthorized" whenever it is in violation of an established, non-discretionary state procedure, or is something additional required? Does conduct in violation of established procedures by a high ranking official (a policy maker) itself create new policy and render such conduct "authorized" by definition?

Another issue is what constitutes adequate post-deprivation remedy. While not all federal circuits agree on every aspect of the Parratt-Hudson Doctrine, the 1st Circuit's approach is relatively clear, and provides significant protection to state and municipal defendants.

General parameters of the Parratt-Hudson Doctrine

The U.S. Supreme Court has recognized that while substantive due process violations occur

at the time of the deprivation (because it is the deprivation itself which is unconstitutional), procedural due process violations are not complete at the time of the deprivation, but only when the state fails to provide due process (because it is the lack of appropriate process, not the deprivation, which is unconstitutional). Zinermon v. Burch, 494 U.S. 113, 125-26 (1990). The critical inquiry is what process the state provided and whether it was adequate. Id. There simply is no procedural due process violation if adequate state remedies are available.

The Parratt-Hudson Doctrine applies only to procedural, not substantive, due process violations. In determining what process is due, a court must weigh several factors:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest ..."

(Zinermon, 494 U.S. at 127, quoting Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).

In Loudermill, the court applied this balancing test to a claim that a school district violated its employees' procedural due process rights when it terminated their employment without a prior hearing. Although the terminated employees had a statutory right to appeal the termination, the statute made no provision for a pre-termination hearing. Concluding that due process normally requires at least a minimal pre-deprivation hearing, the Supreme Court held that the terminated employees had stated a due process claim.

Like Loudermill, the Supreme Court's decisions in Parratt v. Taylor, 451 U.S. 527 (1981), Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), Hudson v. Palmer, 468 U.S. 517 (1984), and Zinermon all apply the factors outlined in Matthews to determine what procedural protections are constitutionally required. According to the Court in Zinermon, "Parratt is not an exception to the Matthews balancing test, but rather an application of that test to the unusual case in which one of the variables in the Matthews equation — the value of pre-deprivation safeguards — is negligible in preventing the kind of deprivation at issue." (494 U.S. at 128-29.)

In Parratt, a state prisoner brought a §1983 action because prison employees had negligently lost materials he had ordered by mail. While recognizing that a pre-deprivation hearing usually is required, the court stressed the special situation in Parratt, noting that the loss was not due to "some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." 451 U.S. at 541. The Parratt court pointed out that the deprivation in that case, "occurred as a result of the unauthorized failure of agents of the state to follow established state proce-

dures. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing." Id. at 543.

In Hudson, the court extended the reasoning of Parratt to intentional deprivations of property, explaining that "[t]he state can no more anticipate the random and unauthorized intentional conduct of its employees than it can similar negligent conduct." 468 U.S. at 533.

In Logan, an employee filed a claim with the Illinois Fair Employment Practices Commission but the commission, through inattention, failed to commence a fact finding conference within 120 days as required by statute and thereby lost jurisdiction to hear the case. The employee claimed that the state's established procedure, which divested the commission of jurisdiction to hear the claim, violated his procedural due process rights. The Supreme Court agreed, holding that Parratt did not apply because the employee was challenging not the random and unauthorized conduct of a state official but the established state procedure itself.

The 'Zinermon' decision

Zinermon is consistent with Parratt, Logan and Hudson, but involved circumstances that rendered the Parratt-Hudson doctrine inapplicable. In Zinermon, Burch had been admitted to a psychiatric institution as a "voluntary" patient but alleged that hospital staff had failed to obtain his informed consent and therefore, wrongfully had deprived him of his liberty. The defendants claimed that the Parratt-Hudson doctrine applied, but the Supreme Court disagreed. While confirming that the Parratt-Hudson doctrine can apply to deprivations of liberty as well as property, the court stressed the distinction made in prior cases between losses caused by random and unauthorized conduct (to which Parratt-Hudson applied) and losses resulting from established state procedure (for which a §1983 claim could be brought). 494 U.S. at 130.

Applying that distinction, the Zinermon court concluded that the loss suffered by Burch occurred because Florida's statutes delegated broad power to hospital staff to admit psychiatric patients (depriving them of their liberty), but failed to circumscribe that power by requiring that a member of the staff determine whether the prospective voluntary admittee was mentally fit to give informed consent to a voluntary admission:

"The Florida statutes, of course, do not allow incompetent persons to be admitted as 'voluntary' patients. But the statutes do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient. Florida chose to delegate to petitioners a broad power to admit patients to FSH-1, i.e., to effect what, in the absence of informed consent, is a substantial deprivation of liberty. Burch is not simply

Kevin F. Moloney is a shareholder of Barron & Stadfeld in Boston. He concentrates in complex civil litigation, both trial and appellate, for both plaintiffs and defendants. He can be reached at kfm@barronstad.com.

Roger T. Manwaring is an attorney at Barron & Stadfeld in Boston. He concentrates in civil litigation, with an emphasis on legal research and writing. Mr. Manwaring is senior researcher for the Barron & Stadfeld Legal Research and Writing Service (www.barronstad.com/research.html), serving attorneys in private and corporate practice. He can be reached at rtm@barronstad.com.

Moloney and Manwaring successfully defended the sheriff of Plymouth County before the 1st Circuit in Hadfield and successfully opposed a motion for writ of certiorari in the U.S. Supreme Court.

attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue." *Id.* at 135.

The court in *Zinermon* distinguished *Parratt* and *Hudson* in three ways. First, due to the special nature of mental illness, it was foreseeable that under Florida's statutory scheme, which did not require a procedure to determine the competency of a patient before voluntary admission, a patient seeking treatment for mental illness might not be competent and might be admitted despite a lack of informed consent. Moreover, the state could predict precisely when that deprivation of liberty would occur. In contrast, the court noted that while the state in *Parratt* and *Hudson* might anticipate that on occasion a prison employee negligently or intentionally would lose or destroy an inmate's property, the state could not predict when those deprivations would occur. *Id.* at 136.

Second, the court in *Zinermon* concluded that, unlike in *Parratt* and *Hudson*, pre-deprivation process was possible and would have been of value in avoiding the deprivation complained of. The court noted that *Zinermon* was not a case like *Hudson* in which the employee was "bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards." *Id.* at 137. Had the state in *Zinermon* established procedures for obtaining informed consent, there was no reason to believe that the staff would not have followed those rules.

Finally, in *Zinermon*, the court said that the conduct of the hospital staff in that case was not "unauthorized" within the meaning of *Parratt* and *Hudson*. Instead, the court noted that the hospital staff had been delegated broad discretionary authority that had not been delegated to the prison employees in *Parratt* or *Hudson*. The deprivation in *Zinermon*, the court said, was "unauthorized" only in the sense that it was not an act sanctioned by state law." *Id.* at 137-38.

The 1st Circuit's interpretation of 'random and unauthorized'

Zinermon created confusion as to what type of conduct is "random and unauthorized" for purposes of *Parratt-Hudson*. One view is that an official's conduct is "unauthorized" whenever it violates an established non-discretionary state law procedure. The contrary view is that even conduct in violation of such an established procedure can still be "authorized" if the official in question had the power to act as he or she did, but abused that power.

Under the former view, for example, the act of a county sheriff in terminating civil servant deputies without the prior hearing required by law is unauthorized precisely because it violates the non-discretionary requirement that a prior hearing be conducted. Under the latter view, however, such conduct would be authorized because a sheriff has the general power to terminate deputies,

and simply abused that power by doing so without the required hearing.

These two approaches correspond to two views of §1983 liability generally, the legalist model and the governmental model. *Bogart v. Chapell*, 396 F.3d 548, 563-64 (4th Cir. 2005) (Williams, J., dissenting). The legalist model imposes liability on the state for an official's constitutional violation only if the state (or municipality) has endorsed that violation. *Id.* Thus, conduct is "unauthorized," the *Parratt-Hudson* Doctrine applies, and there is no state liability for a procedural due process violation, if the conduct at issue violates state law or established policy and there is an adequate post-deprivation remedy. Language in *Zinermon* stressing the distinction between losses caused by random and unauthorized conduct and losses resulting from established state procedure supports the legalist interpretation.

The governmental model deems conduct to be authorized, imposes liability on the state, and renders *Parratt-Hudson* inapplicable, whenever the violation at issue was committed by an official in the scope of his or her employment, even if the conduct violates state law. *Id.* Courts adopting this view rely on the statement in *Zinermon* that the deprivation was "unauthorized" only in the sense that it was not an act sanctioned by state law." 494 U.S. at 137-38.

The 1st Circuit has consistently favored the legalist approach, narrowing §1983 liability by broadly applying the *Parratt-Hudson* Doctrine.

According to the court in *Hadfield*, "Our cases establish that a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law ... In other words, conduct is "random and unauthorized" within the meaning of *Parratt-Hudson* when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself." (407 F.3d at 20.)

Similarly, in *Chmielinski v. Comm. of Massachusetts*, 513 F.3d 309, 315 (1st Cir. 2008), the Appeals Court explained that "The *Parratt-Hudson* doctrine exists to protect states from needlessly defending the adequacy of state law process when the alleged due process violation results from a deviation from that process. Neither the statute nor the regulations set out any procedural requirements, providing only that the hearing be 'informal.' Thus, the hearing that *Chmielinski* received cannot be characterized as a deviation from the state law; it was not random and unauthorized." See also *Bourne v. Town of Madison*, 494 F.Supp.2d 80, 88-89 (D.N.H. 2007).

An additional issue left undecided by *Zinermon* is whether, if conduct consistent with established policies is "authorized," conduct by a high ranking, policy making official must necessarily be deemed authorized because that very conduct effects a change in prior policy. The 2nd U.S. Circuit Court of Appeals has adopted this rule (*Dwyer v. Regan*, 777 F.2d 825 (1985)), holding that conduct which otherwise

could be considered random and unauthorized, including conduct in violation of established state law, is not random and unauthorized if the actor is a "high-ranking official having final authority over the decision-making process." *Id.* at 832.

However, the other circuits which have considered the issue have rejected the rejected the high ranking official exception to *Parratt-Hudson*. The 1st Circuit has not considered the issue directly. Notably, however, while the plaintiffs in *Hadfield* raised the high ranking official exception, the court, without discussion, held that *Parratt-Hudson* applied.

What constitutes an adequate post-deprivation remedy?

For the *Parratt-Hudson* Doctrine to apply, an adequate state law post-deprivation remedy must have been available to the plaintiff at the time of the deprivation. However, establishing the existence of a post-deprivation remedy is not difficult. Citing *Parratt*, the Appeals Court for the 1st Circuit has noted that such a remedy may be statutory or provided by common law, as in the case of a tort action (*Lowe*, 959 F.2d at 341).

In addition, the availability of administrative and judicial review of decisions made by state officials constitutes adequate post-deprivation process (*Hadfield*, 407 F.3d at 21, citing *Herwins v. City of Revere*, 163 F.3d 15, 19 (1st Cir.1998)). Notably, a state post-deprivation remedy may be adequate even where it fails to provide all of the relief which would have been available through a §1983 action (*Parratt*, 451 U.S. at 544).

In *Hadfield*, the Appeals Court held that Massachusetts provided adequate post-deprivation remedies to the deputy sheriffs who had been terminated without prior hearing because G.L.c. 35, §51 allowed the deputies to appeal their terminations to the civil service commission and, if successful, to obtain reinstatement and back pay.

While a plaintiff may assert that a state provided remedy is inadequate because it would require the plaintiff to endure long delays associated with litigation, a court is likely to reject such an argument in all but the most extreme

circumstances. Although the U.S. Supreme Court has recognized that "at some point, a delay in the post-termination hearing would become a constitutional violation," (*Loudermill*, 470 U.S. at 547), the slow pace of normal litigation is not the kind of delay which renders a post-deprivation remedy inadequate.

In fact, the *Loudermill* court held that a nine-month delay in providing a hearing did not work a denial of due process, while other federal courts have held that delays of two years did not violate due process (*Mathews v. Eldridge*, 424 U.S. 319, 342, (1976) (11-month delay); *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989) (19 months); *Ritter v. Cohen*, 797 F.2d 119, 124 (3d Cir. 1986) (20 months); *Givens v. United States Railroad Retirement Bd.*, 720 F.2d 196, 201 (D.C. Cir. 1983) (19 months); *Frock v. United States Railroad Retirement Bd.*, 685 F.2d 1041, 1047 (7th Cir. 1982) (two years)).

In *Easter House v. Felder*, 910 F.2d 1387, 1406 (1990), the Appeals Court for the 7th Circuit, noting that "almost all litigation, whether conducted in a state or federal forum, may be characterized as a lengthy and speculative process," stated:

"[W]e should not reject the application of *Parratt* unless the remedy which an injured party may pursue in state court can readily be characterized as inadequate to the point that it is meaningless or nonexistent and, thus, in no way can be said to provide the due process relief guaranteed by the fourteenth amendment."

A powerful weapon for government defendants

The *Parratt-Hudson* Doctrine, especially as broadly applied in the 1st Circuit, affords state and municipal defendants substantial protection from §1983 lawsuits based on alleged violations of procedural due process. While still subject to suit where the deprivation of due process was consistent with established policy, or where the state delegated to officials broad and uncircumscribed discretion to effect the deprivation complained of, *Parratt-Hudson* shields government employers from liability based on a public official's unforeseeable violation of facially valid procedures.

