

**PRE-TERMINATION HEARINGS
(LOUDERMILL HEARINGS)**
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A. When Loudermill Applies.

A tenured public employee who is entitled to just cause protection by virtue of the Civil Service laws, collective bargaining agreement, city code, contract, or policy manual is entitled to due process protection. The process due a tenured public employee is not determined by the City's code, but rather by the Constitutional due process clause. In order to determine what process is due, courts balance the interests at stake in a particular case. In public employment discharge cases, the following factors are considered:

1. *The employee's interests.* The employee's interests in retaining employment;
2. *The employer's interests.* The governmental interest in the expeditious removal of unsatisfactory employees; and
3. *Preventing mistakes.* The risk of an erroneous termination.

B. What Loudermill Requires.

In Cleveland Board of Education v. Loudermill, the U.S. Supreme Court balanced the factors described above and concluded that a pre-termination hearing was required before the discharge of two public employees. The Court held that due process required the following:

1. *Reasonable notice.* The tenured public employee is entitled to oral or written notice of the charges against him and an explanation of the employer's evidence. The notice must be reasonable and must include the time for responding. For example, a letter sent to a police sergeant's home giving him four days to respond to allegations of excessive force was deemed sufficient notice. The notice should also include a description of the consequences for failing to respond. For proof reasons and to avoid misunderstandings, it is generally appropriate to give notice in writing.

2. *An opportunity to respond.* The employee must be given an opportunity to present reasons, either in person or in writing, why the proposed actions should not be taken. This opportunity to respond must be prior to the termination. This opportunity may be satisfied by an informal conference. For instance, in a Washington case called Danielson, a police officer was interviewed by the Seattle Police Department's Internal Investigation Section (IIS) prior to discharge. During that interview, IIS explained the charges against him, described the supporting evidence, and allowed him to explain his actions. This interview, though informal, met the requirements of the due process clause.

3. *Failure to respond.* Loudermill may also be satisfied when the employer provides an adequate opportunity to respond but the employee fails to utilize that opportunity.

C. Scope of Loudermill Hearing.

1. *Intent of Loudermill.* Under Loudermill, a pretermination hearing is not meant to resolve all the issues, but merely to give the employee an opportunity to respond to the facts upon which a charge is based, since a post-termination hearing would still be available to address more subtle or complex issues.

2. *Effect of a Loudermill violation.* Even if a court finds that an employer improperly denied a worker his or her Loudermill hearing, the court still needs to decide whether a pre-termination hearing would have prevented the discharge. If a pre-termination hearing would "within reasonable probabilities" have prevented the discharge, then an employee may be entitled to reinstatement and back pay. However, if the court finds the pre-termination hearing would not have prevented the discharge, then an employee's remedy, if any, would merely be the damages proximately caused by the lack of a proper pre-termination hearing. For example, in a Washington case called Hoflin v. Ocean Shores, the court decided that Loudermill does not require an employer to correctly identify the statute or ordinance it relies upon to justify dismissal prior to termination.

3. *Conduct of pretermination conferences.* The conduct of pretermination conferences is usually set forth in the Manual.