Must Post-Termination Procedural Due Process Include a Full, Trial-Like Evidentiary Hearing? A Critique of *Townsel v. San Diego Metropolitan Transit Development Board**

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I would like to thank Professor John M. Rogers of the University of Kentucky College of Law for his time and advice in the preparation of this Casenote. I would also like to thank Jack Balderson, Jr. and Robert Hicks for their contributions. This Casenote is dedicated to my wife, Kara, for her love, support, and encouragement.

I. INTRODUCTION

The due process clause of the Fourteenth Amendment has been held to prohibit the deprivation of a constitutionally protected property interest without "appropriate procedural safeguards."[1] The California Court of Appeal for the Fourth District recently decided what procedural safeguards were appropriate for a post-termination hearing following the discharge of a public employee. In *Townsel v. San Diego Metropolitan Transit Development Board*,[2] the court held that all public employees removable only for cause are entitled to a full, trial-like post-termination evidentiary hearing where the government employer must prove its case against the discharged employee.[3] This Casenote questions the *Townsel* court's holding.

Prior to the *Townsel* decision, no court had concluded that public employees not subject to civil service statutes, or other statutory schemes granting such a hearing, were entitled to full, post-termination evidentiary hearings. In fact, the United States Supreme Court has never held that a permanent employee is entitled to a full, post-termination evidentiary hearing.[4] *Townsel* can be distinguished from the cases on which the California Court of Appeal for the Fourth District bases its decision. In addition, an application of the proper constitutional

1. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).
2. 77 Cal. Rptr. 2d 231 (Ct. App. 1998).
3. *See id.* at 234.
4. *See* Holmes v. District Attorney, 81 Cal. Rptr. 2d 174, 179 (Ct. App. 1998) (recognizing that "[t]he [Supreme Court] has never held that an employee, tenured or otherwise, must be given a full evidentiary hearing before or after being terminated").

standards for determining the minimum requirements for post-termination procedural due process does not support the *Townsel* court's broad holding. Consequently, this Casenote argues that while the right result was reached in *Townsel*, the court's decision goes too far and overstates the minimum requirements of post-termination procedural due process.

II. BACKGROUND

A. *The* Townsel *Decision*

1. *Factual Background*

Rodric Townsel ("Townsel") was a code compliance inspector[5] for the San Diego Metropolitan Transit Development Board ("MTDB").[6] Though not a member of the civil service,[7] Townsel's employment could only be terminated for cause.[8] In April 1994, Townsel was discharged for violating specific MTDB rules during an alleged assault of two passengers at a trolley station on March 5, 1994.[9] Prior to his

5. Townsel inspected the fares of passengers boarding the San Diego Trolley transit system to be sure that trolley passengers paid the proper fares. *See* Respondent's Brief at 2, *Townsel* (No. D 026485).

6. *See Townsel*, 77 Cal. Rptr. 2d at 231.

7. Civil service is a government employee system where appointments and seniority are based on merit or examination, as opposed to political patronage. *See* WEBSTER'S INTERNATIONAL DICTIONARY 413 (3d ed. 1986).

8. *See Townsel*, 77 Cal. Rptr. 2d at 232. Those California public employees falling within the coverage of one of several civil service statutes may only be terminated for cause. *See, e.g.*, CAL. EDUC. CODE § 44932 (West 1998 & Supp. 1999) (setting forth ten "causes" as the only grounds permissible for dismissing permanent employees).

9. *See Townsel*, 77 Cal. Rptr. 2d at 233. According to a complaint filed with the MTDB, Townsel put his arms around two female passengers while checking their trolley fares. When they tried to get away, he grabbed one by the hair, and prevented the other from calling the police by grabbing her by the face and neck and pushing her away from a public telephone. *See id.* Townsel was criminally charged with misdemeanor battery but was acquitted following a jury trial. *See id.*

Apparently, this was not the only incident Townsel was involved in during his employment. The MTDB claims that Townsel had a "severe deficiency interacting with the public, fellow employees and supervisory staff." Respondent's Brief at 2, *Townsel* (No. D 026485). Townsel's disciplinary history indicated that he, among other things: forced a woman passenger off a train using a judo move because she had the wrong fare; used excessive profanity toward passengers while making radio transmissions; knocked a passenger to the ground and handcuffed him after pulling him from the trolley, but let him go after learning he was a peace officer; made a young man take his shoes and socks off to search for money because he had an incorrect fare; and continually used

termination, Townsel was provided with written notice of the specific rules he violated, and was given a pre-termination "*Skelly* hearing."[10] In *Skelly v. State Personnel Board*,[11] the California Supreme Court held that because permanent civil service employees have a property interest in continued employment, procedural due process entitles them to certain pre-termination safeguards including "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and right to respond, either orally or in writing, to the authority initially imposing discipline."[12] Following the *Skelly* hearing, Townsel was informed of his termination by the MTDB's general manager.[13]

Townsel appealed the general manager's decision to the MTDB's Board of Directors and appeared twice in front of the three-member committee appointed to hear his appeal.[14] At the first hearing, Townsel denied the allegations against him and argued that he was entitled to a full evidentiary hearing.[15] At the second hearing, Townsel's demand for a full evidentiary hearing was denied.[16] After hearing from the MTDB's lawyers and questioning Townsel and a management witness, the committee recommended upholding the decision to terminate Townsel's employment.[17] The recommendation was ratified by the MTDB's Board

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inappropriate and insubordinate conduct toward both passengers and supervisors. *See id.* at 3-5.

10. *See Townsel*, 77 Cal. Rptr. 2d at 233. A pre-termination hearing is called a *Skelly* hearing in California after *Skelly v. State Personnel Board*, 539 P.2d 774 (Cal. 1975).

11. 539 P.2d 774 (Cal. 1975).

12. *Id.* at 788-89. The *Skelly* decision is essentially California's analogue to Justice Powell's concurring opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974). In *Arnett*, a plurality of the United States Supreme Court held that although the statutory provisions of the Lloyd-LaFollette Act allowed civil service employees removable only for cause to be discharged without a trial-type hearing, the Act did not violate procedural due process because in creating the governmental right, Congress could also define the procedures for removing that right. *See id.* at 151-54 (Rehnquist, J., plurality opinion). The plurality opinion in *Arnett* was subsequently rejected by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Justice Powell agreed with the result in *Arnett*, but he argued that because civil service employees could only be removed for cause, the statute created a property interest in continued employment protected by procedural due process. *See Arnett*, 416 U.S. at 166 (Powell, J., concurring). However, he concluded that procedural due process was not violated in that case because of the statutory safeguards provided in the Lloyd-LaFollette Act. *See id.* at 170. Those safeguards included written notice of the reasons for the proposed discharge, access to the materials on which the notice was based, and a right to respond either orally or in writing. *See id.*

13. *See Townsel*, 77 Cal. Rptr. 2d at 233.

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

of Directors.[18] Townsel appealed the decision, but the superior court concluded that Townsel had been afforded his constitutional rights by virtue of his *Skelly* hearing.[19]

2. *The Holding*

The California Court of Appeal for the Fourth District agreed with Townsel. Reversing the superior court's decision, it held that he had a right to a full post-termination evidentiary hearing in which the MTDB had the burden of proving its case against Townsel.[20] Specifically, the court held that

> the due process requirement of an evidentiary hearing at some point in the termination process applies to any public employee who has a constitutionally protected property interest in his continued employment, *regardless of whether the employee is in the civil service system or is subject to a statutory scheme that specifically provides the required evidentiary hearing.*[21]

Since such a hearing was not provided before termination, the court reasoned that Townsel was entitled to a post-termination evidentiary hearing.[22] In reaching its conclusion, the court relied on the following rule:

> "[P]rocedural due process requires that where a tenured government employee is to be discharged: (1) he be given notice of the charges against him or other cause for his discharge and an opportunity to respond to the official who is to make the decision to terminate, and (2) he be given a post-termination evidentiary hearing within a reasonable time after his discharge with a right to reinstatement with back pay if his discharge is found to have been without good cause."[23]

Finally, the court held that procedural due process required that such a hearing be provided, despite the fact that the MTDB's regulations did not provide for a full evidentiary hearing and the MTDB lacked the power to issue subpoenas, administer oaths, or compel witness testimony.[24]

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18. *See id.*
19. *See id.*
20. *See id.* at 236.
21. *Id.* (emphasis added).
22. *See id.* at 234.
23. *Id.* at 234 (quoting Kristal v. California State Personnel Bd., 123 Cal. Rptr. 512, 518 (Ct. App. 1975), *disapproved on other grounds by* Barber v. State Personnel Bd., 556 P.2d 306 (Cal. 1976)).
24. *See id.* at 236-37. The court did address one additional issue, but it is beyond

B. *Scope of the Procedural Due Process Issue*

The *Townsel* decision is obviously a case involving the requirements of Constitutional procedural due process. It is important, however, to clarify precisely the narrow aspect of procedural due process that this Casenote addresses.

The central meaning of procedural due process is that a party whose rights are to be affected is entitled to notice and an opportunity to be heard.[25] In addition, the notice and opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[26] From this formulation, three distinct factors of procedural due process can be identified: whether a hearing is due, when a hearing is due, and what type of hearing is due.

1. *Is a Hearing Required by Due Process?*

The *Townsel* case did not address the question of whether Townsel was entitled to a hearing. This element of procedural due process was clearly met because Townsel had a constitutionally protected property interest in continued employment.

The requirements of procedural due process must be met when a party is deprived of liberty or property interests protected by the Fourteenth Amendment.[27] Mere loss of public employment does not mean loss of a liberty interest.[28] Since property interests are not created by the

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the scope of this Casenote. In addition to its claim that Townsel was not entitled to a full evidentiary hearing, the MTDB argued that Townsel was collaterally estopped from litigating the issue. *See id.* at 237. Prior to the incident giving rise to his termination, Townsel had been suspended for three weeks and put on probation for six months for violating several MTDB rules. *See id.* at 232. As with his termination, Townsel had been provided a pre-disciplinary *Skelly* hearing. *See id.* Townsel filed a petition for a writ of mandamus in the U.S. District Court claiming that he was entitled to a post-disciplinary evidentiary hearing. *See id.* The court denied the petition, holding that "T[ownsel] is not entitled to the procedural requirements established for civil service employees, because T[ownsel] is not a civil service employee. By receiving [a] *Skelly* hearing, T[ownsel] received all he was entitled to under the law." *Id.* (third alteration in original). As a result of this ruling, MTDB claimed that Townsel was collaterally estopped from litigating whether he was entitled to a full post-termination evidentiary hearing. The *Townsel* court rejected this assertion. *See id.* at 327-38.

25. *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863)).

26. *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

27. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972).

28. *See id.* at 572-73. Liberty interests can be implicated in some cases of deprivation of public employment. According to *Roth*, a decision to terminate, or a refusal to re-hire a public employee, implicates a person's liberty interests when "[that] person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Id.* at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

Constitution but are defined by state statute, a procedural due process right to a hearing only attaches if the state converts an otherwise optional benefit into a property interest.[29]

It has been widely held by both California and federal courts that if a public employee is subject to discharge only for cause, that employee has a property interest which is subject to the procedural due process protections of the Constitution.[30] Since Townsel could only be removed for cause, there is no question that procedural due process entitled him to a hearing. As a result, whether a hearing is required by due process is not the critical component of procedural due process addressed by this Casenote or the *Townsel* decision.

2. *When Does Due Process Require that a Hearing Be Held?*

Though related to the type of hearing required by due process, this Casenote does not address the timing component of procedural due process. The *Townsel* court held that permanent employees are entitled to a full evidentiary hearing "*at some point in the termination process*," and because Townsel did not receive such a hearing prior to his termination, procedural due process required that he be afforded a post-termination evidentiary hearing.[31]

This Casenote does not challenge the *Townsel* court's conclusion with respect to *when* the full evidentiary hearing was to be held. Instead, this Casenote focuses on the narrow issue of the *type* of hearing to which

29. *See id.* at 576-78.

30. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 928-29 (1997) (recognizing that public employees who can be discharged only for cause have constitutionally protected property interest in their tenure and cannot be fired without due process); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) (holding that state civil service employee removable only for cause had a property interest in continued employment and thus fell within protections of due process); Arnett v. Kennedy, 416 U.S. 134, 170 (1974) (Powell, J., concurring) (applying procedural due process rights to federal employee who had a property right in continued employment because he could only be removed for cause); Coleman v. Department of Personnel Admin., 805 P.2d 300, 304-05 (Cal. 1991) (holding that statutory scheme regulating civil service employment confers due process property interest on employees who achieve status of permanent employees); Skelly v. State Personnel Bd., 539 P.2d 774, 783 (Cal. 1975) (explaining that because permanent civil service employees have a property interest in continued employment they are entitled to procedural due process protections); Mendoza v. Regents of Univ. of Cal., 144 Cal. Rptr. 117, 119 (Ct. App. 1978) (recognizing that employees dischargeable only for cause have a protected due process property interest in continued employment).

31. Townsel v. San Diego Metro. Transit Dev. Bd., 77 Cal. Rptr. 2d 231, 234 (Ct. App. 1998) (emphasis added).

Townsel was entitled. In so doing, it challenges the court's conclusion that due process entitles *all* permanent employees to full evidentiary hearings, *regardless* of whether they are members of the civil service system or are subject to a statute that specifically grants them a right to such a hearing.[32]

3. *What Type of Hearing Is Required by Due Process?*

The procedural due process component upon which the *Townsel* decision is based is the type of hearing required. More specifically, the court decided what procedural safeguards are appropriate for a post-termination hearing following the discharge of a public employee.

Once it has been determined that a terminated public employee has a property interest in continued employment, due process prohibits the deprivation of the property interest without "appropriate procedural safeguards."[33] The United States Supreme Court has held that some form of pre-termination hearing must be provided to a public employee who holds a property interest in continued employment.[34] The purpose of the pre-termination hearing is to be an initial check against mistaken decisions.[35] At this stage, the "employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[36] There is no dispute that Townsel's pre-termination procedural due process rights were satisfied when he received a *Skelly* hearing prior to termination.[37]

In order to determine whether post-termination hearings satisfy "minimal requirements of due process,"[38] a court must balance three factors as set forth by the Supreme Court in *Mathews v. Eldridge*[39]: (1) the private interest being affected by the government action; (2) the risk that the interest is being deprived erroneously and the value, if any, of additional safeguards; and (3) the government's interest, including administrative burdens caused by the imposition of additional procedural requirements.[40]

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32. *See id.* at 236.
33. *Loudermill*, 470 U.S. at 541.
34. *See id.* at 545.
35. *See id.* at 545-46.
36. *Id.* at 546 (citing Arnett v. Kennedy, 416 U.S. 134, 170-71 (1974) (Powell, J., concurring)).
37. *See supra* notes 10-12 and accompanying text.
38. Washington Teachers' Union v. Board of Educ., 107 F.3d 774, 780 (D.C. Cir. 1997) (quoting UDC Chairs Chapter v. Board of Trustees, 56 F.3d 1469, 1473 (D.C. Cir. 1995)).
39. 424 U.S. 319 (1976).
40. *See Washington Teachers' Union*, 109 F.3d at 780 (citing *Eldridge*, 424 U.S. at 335 (1976)).

The *Townsel* court concluded that the appeal process as established by the MTDB was insufficient as a post-termination hearing and held that Townsel was entitled to a full evidentiary, trial-like hearing in which the MTDB had the burden of proving its case against him.[41] Conspicuously absent from the court's analysis is any mention, let alone application, of the *Eldridge* balancing factors. Prior to the *Townsel* decision, no court had concluded that public employees not subject to civil service statutes, or other statutory schemes granting such a hearing, were entitled to full post-termination evidentiary hearings. In fact, the California Court of Appeal for the First District recently recognized that "[t]he [United States Supreme] [C]ourt has never held that an employee, tenured or otherwise, must be given a full evidentiary hearing before or after being terminated."[42] *Townsel* can be distinguished from the cases on which the court bases its decision, and a proper balancing of the *Eldridge* factors does not support the *Townsel* court's holding. Consequently, the holding of *Townsel* goes beyond the minimum requirements of post-termination procedural due process.

III. THE *TOWNSEL* DECISION IS DISTINGUISHABLE

There are serious flaws in the *Townsel* court's reasoning. First, the court's decision is not supported by the cases it cites. While many courts may have relied on full post-termination evidentiary hearings to support abbreviated pre-termination procedures, no court has specifically held that procedural due process requires a trial-like evidentiary hearing where the government must prove its termination case.[43] Furthermore, nearly all of the cases primarily relied on by the *Townsel* court in support of its holding are distinguishable on one of two grounds: either the public employee being discharged was a member of the civil service system, or the employee was entitled to a full post-termination evidentiary hearing by virtue of some other statutory scheme.[44] *Townsel*,

41. *See* Townsel v. San Diego Metro. Transit Dev. Bd., 77 Cal. Rptr. 2d 231, 234, 236 (Ct. App. 1998).

42. Holmes v. District Attorney, 81 Cal. Rptr. 2d 174, 179 (Ct. App. 1998).

43. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547-48 (1985) (holding that the minimum process that is due is provided by a pre-termination hearing, coupled with post-termination administrative procedures).

44. *See* Garraghty v. Virginia Dep't of Corrections, 52 F.3d 1274, 1277-79 (4th Cir. 1995) (discussing employee subject to state grievance procedure which provided for post-termination hearing); Egan v. Department of the Navy, 802 F.2d 1563, 1567-69 (Fed. Cir. 1986), *rev'd on other grounds*, 484 U.S. 518 (1988) (noting termination

therefore, can be distinguished from these cases because Townsel was not a member of the civil service and no other statue specifically granted him the right to a full post-termination evidentiary hearing.

A. *The* Townsel *Decision Is Unprecedented*

1. *The* Townsel *Court Bases Its Holding on a "Phantom Rule"*

The most significant flaw in the *Townsel* court's reasoning is that its holding is based on a "distilled" rule that is unsupported by case law.[45] The Court of Appeal for the Fourth District based its holding on a two-prong rule set forth in *Kristal v. California State Personnel Board*.[46] Though the *Townsel* court claimed there is "ample support" for this rule, it failed to adequately provide such support.[47]

Unlike *Townsel*, which dealt with the *type of post-termination* hearing required by procedural due process,[48] the issue before the *Kristal* court was whether a tenured civil service employee could be discharged without a *pre-termination* hearing.[49] Because the case was decided in 1975, the court relied heavily on the Supreme Court's 1974 decision in *Arnett v. Kennedy*.[50]

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procedures governed by federal statute); Kelly v. Smith, 764 F.2d 1412, 1414-15 (11th Cir. 1985), *overruled on other grounds by* McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (relying on *Loudermill*, which involved both a civil service employee and a statutory right to the hearing); Coleman v. Department of Personnel Admin., 805 P.2d 300, 302 (Cal. 1991) (involving civil service employee); Figueroa v. Housing Auth., 182 Cal. Rptr. 497, 499 (Ct. App. 1982) (pointing out that employing agency was governed by state civil service rules, but deciding case on other grounds).

The only case cited by the court that is not distinguishable on one of these two grounds is *Kadushin v. Port Authority*, 603 F. Supp. 1146 (E.D.N.Y. 1985). The issue in this case, however, was significantly different than the issue addressed in *Townsel*. *See infra* notes 107-09 and accompanying text.

45. According to the *Townsel* court, the rule was "distilled" from the United States Supreme Court's opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974). *See Townsel*, 77 Cal. Rptr. 2d at 234.

46. 123 Cal. Rptr. 512 (Ct. App. 1975), *disapproved of on other grounds by* Barber v. State Personnel Bd., 556 P.2d 306 (Cal. 1976). The *Townsel* court stated the rule as follows:

> [P]rocedural due process requires that where a tenured governmental employee is to be discharged: (1) he be given notice of the charges against him or other cause for his discharge and an opportunity to respond to the official who is to make the decision to terminate, and (2) he be given a post-termination evidentiary hearing within a reasonable time after his discharge with a right to reinstatement with back pay if his discharge is found to have been without good cause.

Townsel, 77 Cal. Rptr. 2d at 234 (quoting *Kristal*, 123 Cal. Rptr. at 518).

47. *Townsel*, 77 Cal. Rptr. 2d at 234.

48. *See supra* Part II.B.3.

49. *See Kristal*, 123 Cal. Rptr. at 515.

50. 416 U.S. 134 (1974); *see Kristal*, 123 Cal. Rptr. at 517-18 (discussing the

In *Arnett*, the Supreme Court addressed the constitutionality of the Lloyd-LaFollette Act, which permitted federal civil service employees removable only for cause to be discharged without a trial-type hearing.[51] A plurality of the court held that procedural due process was satisfied, however, because a statutory scheme that creates a right could specify the manner by which the right can be terminated.[52] This concept of "tak[ing] the bitter with the sweet,"[53] was subsequently rejected, however, in *Cleveland Board of Education v. Loudermill*.[54]

After an exhaustive review of the several opinions that comprise the Supreme Court's opinion in *Arnett*,[55] the *Kristal* court used "[e]xtrapolation" to "predict[]" the "apparent principle" on which the *Townsel* court based its holding.[56] As the *Kristal* court explained,

> *Extrapolation predicts* six high court votes in favor of a rule that procedural due process requires that where a tenured government employee is to be discharged: (1) he be given notice of the charges against him or other cause for his discharge and an opportunity to respond to the official who is to make the decision to terminate, and (2) he be given a post-termination evidentiary hearing within a reasonable time after his discharge with a right to reinstatement with back pay if his discharge is found to have been without good cause.[57]

Significantly, the *Kristal* court never reached the second prong of its predicted rule, holding that procedural due process had been violated because no *pre-termination* hearing was provided.[58]

The *Kristal* court fairly ascertained the law with respect to the first prong of its predicted test. In 1975, it extrapolated a holding that the Supreme Court in fact would render ten years later in *Loudermill*.[59] The

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several opinions that make up the Supreme Court's opinion in *Arnett*).

51. *See Arnett*, 416 U.S. at 151.

52. *See id.* at 151-54 (Rehnquist, J., plurality opinion).

53. *Id.* at 154.

54. 470 U.S. 532 (1985).

55. *See Kristal*, 123 Cal. Rptr. at 517-18.

56. *Kristal*, 123 Cal. Rptr. at 518. The *Kristal* court, after using "[e]xtrapolation" to "predict[]" the rule the *Townsel* court relied on, referred to its own rule as "the *apparent* principle of federal constitutional law which governs in the case at bench." *Id.* (emphasis added).

57. *Id.* (emphasis added).

58. *See id.* at 519.

59. The Supreme Court held in *Loudermill* that some form of pre-termination hearing must be provided to a public employee who holds a property interest in continued employment. *See Loudermill*, 470 U.S. at 545. The purpose of the pre-termination hearing is to be an initial check against mistaken decisions. *See id.* at 545-46. The Court held that procedural due process requires that prior to termination, a "tenured public employee is entitled to oral or written notice of the charges against him,

first prong of the predicted rule, however, was not at issue in *Townsel*.[60] It was the second prong of the test that concerned the *Townsel* court, and in that regard the *Kristal* court was only half right. The Supreme Court has never held that absent a statutory right to such a hearing, all permanent government employees are entitled to a post-termination evidentiary hearing.[61] Thus, the *Townsel* court bases it holding on mere dictum that can more appropriately be dubbed a "phantom rule."

2. *The California Cases Cited Do Not Support the Broad Holding in* Townsel

The *Townsel* court failed to provide adequate California support for the phantom *Kristal* rule. It cited no cases supporting its broad holding that procedural due process requires trial-like post-evidentiary hearings for all permanent public employees.

In an attempt to support the *Kristal* rule and its own holding, the *Townsel* court cited language from *Coleman v. Department of Personnel Administration*.[62] The cited language, however, does not represent the holding of *Coleman*, but was taken from the dissenting portion of a concurring and dissenting opinion.[63] This minority opinion first correctly cited *Loudermill* for the proposition that pre-termination procedures consisting of only notice and an informal opportunity to respond act merely as an initial check against mistaken decisions.[64] The dissent then drew the following conclusion:

> A post[-]termination hearing is required by due process to assure that there is a definitive resolution of the propriety of the discharge, in a setting in which the dismissing supervisor must bear the burden of proving to a neutral decisionmaker that the termination rests on an accurate assessment of the facts.[65]

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an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546 (citing Arnett v. Kennedy, 416 U.S. 134, 170-71 (1974) (Powell, J., concurring)).

60. Townsel received a pre-termination *Skelly* hearing, the requirements of which mirror those set forth in *Loudermill*. *See supra* notes 10-12 and accompanying text.

61. *See* Holmes v. District Attorney, 81 Cal. Rptr. 2d 174, 179 (Ct. App. 1998) (recognizing that "[t]he [United States Supreme] [C]ourt has never held that an employee, tenured or otherwise, must be given a full evidentiary hearing before or after being terminated").

62. 805 P.2d 300 (Cal. 1991).

63. *See Townsel*, 77 Cal. Rptr. 2d at 234-35; *see also Coleman*, 805 P.2d at 314-21 (Broussard, J., concurring and dissenting).

64. *See Townsel*, 77 Cal. Rptr. 2d at 234; *see also Coleman*, 805 P.2d at 319 (Broussard, J., concurring and dissenting) (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1975)).

65. *Coleman*, 805 P.2d at 319 (Broussard, J., concurring and dissenting); *see Townsel*, 77 Cal. Rptr. 2d at 234-35 (quoting *Coleman*).

However, *Loudermill* did not hold that such a post-termination hearing is required by procedural due process.[66] In *Loudermill*, the Supreme Court considered the issue of what *pre-termination* procedures are required by due process for public employees who can only be discharged for cause.[67] The Court concluded that "some kind of hearing" must be provided prior to the discharge of such employees, including notice and an opportunity to be heard.[68] In establishing these minimal pre-termination procedural requirements, the Court admitted that its holding "rest[ed] in part on the provisions in [the Ohio civil service law] for a full post-termination hearing."[69] While the Court may have relied on the post-termination evidentiary hearing provided by the Ohio civil service statute in determining the minimal requirements for pre-termination procedures, it never determined what minimal procedures are necessary at the post-termination hearing. Clearly, those set forth in the Ohio statute were satisfactory,[70] but there is no indication by the Court that a full, trial-like evidentiary hearing, where the government has the burden of proving its termination case, is *required* by procedural due process absent a statute granting such a hearing.

Nevertheless, the *Townsel* court attempted to give credence to the *Coleman* dissent's misplaced conclusion, and thus provide support for the *Kristal* rule, by claiming that the dissent's conclusion was adopted by the *Coleman* majority.[71] The court asserted that the *Coleman* majority "apparently agreed" with the dissent because it said:

> "[U]nlike an employee who is discharged for cause, an employee who has been determined to have resigned under the [absent without leave] statute does not have a due process right to a post-severance evidentiary hearing at which the state must prove the facts supporting the determination of resignation."[72]

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66. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (holding that some form of *pre-termination* hearing is necessary before discharging a public employee who has a constitutionally protected property interest in continued employment).

67. *See id.* at 535.

68. *See id.* at 546 (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1281 (1975)).

69. *Id.*

70. The Ohio statute called for providing the dismissed employee with the reasons for his removal, and the ability to file a written appeal. *See id.* at 539 n.6. According to the statute, if such an appeal is filed, a "trial board" is appointed to hear the appeal with the power to "affirm, disaffirm, or modify" the termination decision. *Id.* Either side then has the right to obtain review of the final decision in state court. *See id.*

71. *See Townsel*, 77 Cal. Rptr. 2d at 235.

72. *Id.* (quoting *Coleman*, 805 P.2d at 309) (emphasis omitted) (citations omitted)

When analyzed carefully, this language fails to support the *Coleman* dissent, the *Kristal* dictum, or consequently, the *Townsel* court's holding.

First, the issue in *Coleman* was whether a state must provide procedural safeguards when exercising its statutory authority to treat an unexcused absent tenured civil service employee as "automatically resign[ed]."[73] The court addressed both pre-termination and post-termination procedures.[74] Significantly, the court determined that with regard to post-termination procedures, no evidentiary hearing was required for employees deemed to have constructively resigned.[75] The court did not, however, express any opinion as to what minimal post-termination procedures are required when discharging a public employee who can only be terminated for cause.

Second, in the heart of the language constituting the *Coleman* court's "apparent agreement" with the dissent, the majority cites both *Skelly v. State Personnel Board*[76] and *Kirkpatrick v. Civil Service Commission*[77] for their recognition that permanent civil service employees have a *statutory right* to a post-termination evidentiary hearing.[78] Notably, the *Townsel* court was cognizant of this recognition, for it made reference to it in a footnote immediately following the cited language of the *Coleman* majority.[79] The fact that both the *Coleman* court and the *Townsel* court felt it necessary to point out that civil service employees have a *statutory right* to a post-termination evidentiary hearing is significant, because it reinforces the fact that no court has declared that, absent such a statutory right, a permanent employee has a procedural due process right to a full post-termination evidentiary hearing.

Third, and perhaps most significantly, the *Coleman* court actually discussed the *Kristal* decision.[80] In characterizing the holding of the case, however, the court did not even mention *post-termination* requirements. Instead, it correctly observed that the *Kristal* holding was limited to the nature of *pre-termination* procedural protections.[81] If the *Coleman* majority was truly endorsing the dissent's sweeping argument, and thus supporting the phantom *Kristal* rule, there should have been

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(first alteration in original).

73. *Coleman*, 805 P.2d at 302.
74. *See id.* at 309.
75. *See id.*
76. 539 P.2d 774 (Cal. 1975).
77. 144 Cal. Rptr. 51 (Ct. App. 1978).
78. *See Coleman*, 805 P.2d at 309.
79. *See* Townsel v. San Diego Metro. Transit Dev. Bd., 77 Cal. Rptr. 2d 231, 235 n.3 (Ct. App. 1998).
80. *See Coleman*, 805 P.2d at 312-13.
81. *See id.*

some mention of the rule somewhere in the majority's fifteen-page opinion. No such reference exists.

In support of both the *Kristal* rule and its own holding, the *Townsel* court also cited *Figueroa v. Housing Authority*.[82] As the *Townsel* court pointed out, in *Figueroa* the permanent employee was terminated without a pre-termination hearing, but was given a post-termination hearing in which the government agency did not produce evidence supporting the employee's discharge.[83] According to the *Townsel* court, the court in *Figueroa* responded to the government's claim that its post-termination hearing satisfied the requirements of *Skelly* by arguing that "[e]ven if the hearing Figueroa received would have satisfied the minimal requirements for pretermination notification of charges and opportunity to respond, it would not appear to satisfy the due process requirements for an evidentiary hearing at some point."[84]

The cited language is dicta contained in a footnote.[85] The narrow constitutional issue the court dealt with was "confined" to "the single question whether Figueroa had a property right in his employment such as to require due process upon termination."[86] The court never addressed what minimal post-termination procedural requirements are necessary when discharging permanent public employees. For the first time during oral argument to the Court of Appeal, the government claimed that any remedy to which Figueroa was entitled should be limited to back pay from when he was dismissed to the date of the alleged *Skelly* hearing.[87] It was this contention that prompted the retort from the court—a retort that holds no precedential value.

Even if one disagrees with the contention that the *Figueroa* language holds no precedential value, any persuasive value provided by the court's dicta cuts in a direction favorable to the arguments being presented in this Casenote. First, the court speculated that the hearing provided would not "appear" to satisfy procedural due process.[88] This language supports the notion that no minimal boundary has been established with regard to the procedural due process requirements at the

82. 182 Cal. Rptr. 497 (Ct. App. 1982).
83. *See Townsel*, 77 Cal. Rptr. 2d at 235; *Figueroa*, 182 Cal. Rptr. at 498.
84. *Townsel*, 77 Cal. Rptr. 2d at 235 (quoting *Figueroa*, 182 Cal. Rptr. at 499 n.1) (emphasis omitted).
85. *See Figueroa*, 182 Cal. Rptr. at 499 n.1.
86. *Id.* at 499.
87. *See id.* at 499 n.1.
88. *Id.*

post-termination stage of discharging a permanent public employee. Further, the *Figueroa* court's observation, if given weight, merely suggests that such minimal post-termination procedures include a requirement that the government present evidence in support of its decision to terminate the employee. Arguably, this indirectly supports the *Kristal* court's conclusion that some post-termination evidentiary hearing is necessary. Nonetheless, there is no support for the *Townsel* court's unprecedented holding that such a hearing must be a full, trial-like evidentiary hearing where the government has the burden of proving its termination case.

3. *The Federal Cases Cited Do Not Support the Broad Holding in* Townsel

The *Townsel* court also attempted to provide support for its holding by citing several federal cases.[89] Notably, the court cited no Supreme Court case as direct support for its holding. Instead, it relied entirely on lower federal court cases. Like their California counterparts, these cases fall short of supporting the *Townsel* court's holding that a full post-termination hearing is *required* by procedural due process for *all* public employees.

The court first cited *Kelly v. Smith*[90] for its language that "the assurance that a full evidentiary hearing will be forthcoming is one of the primary reasons for allowing the abbreviated pretermination procedures."[91] The *Kelly* court cited *Loudermill* for this proposition.[92] As noted earlier, however, *Loudermill*, while relying on a statutorily created post-termination process to determine pre-termination requirements, did not hold that a full post-termination evidentiary hearing was required by procedural due process.[93]

It is also significant that the Eleventh Circuit in *Kelly* also did not hold that such a hearing was required. In evaluating the post-termination

89. *See Townsel*, 77 Cal. Rptr. 2d at 235-36 (citing Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985), *overruled on other grounds by* McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994)); Garraghty v. Virginia Dep't of Corrections, 52 F.3d 1274 (4th Cir. 1995); Egan v. Department of the Navy, 802 F.2d 1563 (Fed. Cir. 1986), *rev'd on other grounds*, 484 U.S. 518 (1988); Kadushin v. Port Auth., 603 F. Supp. 1146 (E.D.N.Y. 1985).

90. 764 F.2d 1412 (11th Cir. 1985).

91. *Townsel*, 77 Cal. Rptr. 2d at 235 (quoting Kelly v. Smith, 764 F.2d 1412, 1415 (11th Cir. 1985), *overruled on other grounds by* McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994)).

92. *See Kelly*, 764 F.2d at 1415 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985)).

93. *See supra* notes 66-70 and accompanying text (explaining the *Loudermill* holding).

hearing provided to Kelly, the court was concerned with ensuring a "full, fair and impartial resolution."[94] The only post-termination hearing Kelly received was an informal conference with a manager, prompting the court to conclude that such an "informal meeting . . . was not sufficient to satisfy the requirements of procedural due process."[95] While perhaps adding an element of formality to the minimum requirements for post-termination due process, the *Kelly* decision does not imply, let alone stand, for the proposition that procedural due process requires a full post-termination evidentiary hearing for all public employees.

The *Townsel* court also cited the following language from *Garraghty v. Virginia Department of Corrections*[96]:

> "'The severity of depriving a person [with a property interest in continued employment] of the means of livelihood requires that such a person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'"[97]

While not rising to the level of "ample," *Garraghty* is perhaps the *Townsel* court's best support for the *Kristal* rule.[98] Even conceding arguendo that *Garraghty* supports the *Kristal* court's conclusion that some evidentiary hearing is required after termination, it provides no support for the *Townsel* court's unprecedented holding that procedural due process entitles *all* permanent employees to full, trial-like evidentiary hearings where the government must prove its termination case, *regardless* of whether the employee is a member of the civil service or entitled to such a hearing by virtue of some other statute.

Like the previous cases cited by the *Townsel* court, *Garraghty* does not address the issue of what procedures are necessary at the post-termination stage of a permanent employee's discharge. The relevant language cited by the *Townsel* court arises in the context of the court's consideration of the defendants' "final argument," which the *Garraghty* court characterized as an argument "that [defendants were] entitled to qualified immunity because they were only responsible for providing

94. *Kelly*, 764 F.2d at 1415.
95. *Id.* at 1416.
96. 52 F.3d 1274 (4th Cir. 1995).
97. Townsel v. San Diego Metro. Transit Dev. Bd., 77 Cal. Rptr. 2d 231, 235 (Ct. App. 1998) (quoting Garraghty v. Virginia Dep't of Corrections, 52 F.3d at 1284 (quoting Carter v. Western Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).
98. *See supra* note 47 and accompanying text.

Garraghty with pretermination process and that process satisfied the notice and hearing requirements of *Loudermill*."[99] In concluding that the defendants were not immune from liability, the court recognized that the post-termination hearing provided to Garraghty was procedurally deficient because he was not given the opportunity to confront and examine witnesses.[100]

Like *Kelly*, therefore, *Garraghty* merely adds an element to the minimum requirements of a post-termination hearing for a permanent public employee—the ability to confront and examine witnesses.[101] While perhaps helping to narrow what is required at the post-termination phase of procedural due process, the *Garraghty* language cited by the *Townsel* court does nothing further. For this reason, it is insufficient as support for the *Townsel* court's broad assertion that procedural due process requires that all public employees receive a full, trial-like hearing where the government must prove its case against the discharged employee.

The *Townsel* court also pointed out that *Egan v. Department of the Navy*[102] "cited *Loudermill* and *Arnett* for the proposition that 'federal employee due process requires a full evidentiary hearing at some point in the termination proceedings, if not before removal, then after.'"[103] As previously discussed, neither *Loudermill* nor *Arnett* stand for this proposition.[104] More importantly however, the *Egan* court's language, in context, supports the conclusion that *outside* a *statutory* right to such a hearing, no court has held that procedural due process entitles all permanent public employees to a full, trial-like post-termination evidentiary hearing. Consider the entirety of the court's language:

> The procedure designed by the [Merit Systems Protection] Board, which the Board characterizes as "minimum due process", is a departure from the *Civil Service Reform Act's* careful balance of employer and employee interests. This procedure would evict a large class of federal employees from the *statutory safeguards* that this Act provides. Minimum due process under *this Act* requires not only minimal pre-termination procedures, but also requires a post-termination hearing *as provided in 5 U.S.C. § 7701(a)(1).* As discussed in

99. *Garraghty*, 52 F.3d at 1283.
100. *See id.* at 1284.
101. In this respect, the author does not question the implications of *Garraghty* nor *Kelly*. In one of the landmark procedural due process cases, *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court held that due process usually requires an opportunity to confront and examine adverse witnesses (the implication of *Garraghty*) and an opportunity to be heard by an impartial decision-maker (the implication of *Kelly*). *See id.* at 269-71.
102. 802 F.2d 1563 (Fed. Cir. 1986).
103. Townsel v. San Diego Metro. Transit Dev. Bd., 77 Cal. Rptr. 2d 231, 235 (Ct. App. 1998) (citation omitted) (quoting *Egan*, 802 F.2d at 1572, *rev'd on other grounds*, 484 U.S. 518 (1988)).
104. *See supra* Part III.A.1.

> *Arnett v. Kennedy, federal employee* due process requires a full evidentiary hearing at some point in the termination proceedings, if not before removal, then after.[105]

The *Egan* court apparently considered the right to a full evidentiary hearing as one conferred by statute. This point is made stronger when it is recalled that *Arnett* itself dealt with a federal civil service employee granted certain post-termination procedural rights by virtue of the Lloyd LaFollette Act.[106] The fact that the *Egan* court's reference to *Arnett* is in the context of "federal employees" only, and that it immediately follows the discussion of comparable statutes granting federal employees the right to a full evidentiary hearing, is a strong indication of the limited nature of its language. The court was not suggesting, let alone holding, that *all* permanent public employees must be granted a full post-termination evidentiary hearing *because* such a right is required by constitutional procedural due process. Thus, the *Townsel* court again failed in its attempt to provide support for such a holding.

Finally, the *Townsel* court relied on the United States District Court for the Eastern District of New York's opinion in *Kadushin v. Port Authority*.[107] However, that case provides little support for the *Townsel* holding. After discussing whether procedural due process required that Kadushin be afforded a post-termination evidentiary hearing, the court made the following remarks:

> [A]lthough . . . defendant was not required to supply plaintiff with a pre-termination evidentiary hearing, defendant was required to supply plaintiff with (at the least) a post-termination evidentiary hearing before an impartial tribunal . . . . [W]e note that defendant did not supply plaintiff with *any evidentiary hearing whatsoever*, before or after the termination, and hold that defendant has therefore deprived plaintiff of property without due process, in violation of the Due Process Clause of the Fourteenth Amendment.[108]

This language indicates that the operative issue addressed by the *Kadushin* court was *whether* procedural due process required that a post-

105. *Egan*, 802 F.2d at 1572 (emphasis added) (citations omitted). According to the statute, federal employees have a right "to a hearing for which a transcript will be kept." 5 U.S.C. § 7701(a)(1) (1994).

106. *See* Arnett v. Kennedy, 416 U.S. 134, 170 (1974) (Powell, J., concurring) (indicating that the Lloyd LaFollette Act grants federal employees a *statutory* right to a full evidentiary hearing).

107. 603 F. Supp. 1146 (E.D.N.Y. 1985).

108. *Id.* at 1151 (original emphasis omitted) (emphasis added); *see Townsel*, 77 Cal. Rptr. 2d at 235-36 (quoting language from *Kadushin*).

termination hearing be provided.[109] This was not the issue in *Townsel*. There was no question in *Townsel* as to *whether* Townsel received a post-evidentiary hearing—the issue before the court was *what type* of post-termination hearing was required by procedural due process.[110] Therefore, while supportive of the *Kelly* case,[111] *Kadushin* provides no support for the *Townsel* holding.

B. The Importance of Distinguishing Townsel

As pointed out above, nearly all of the cases cited by the *Townsel* court are distinguishable on one of two grounds: either the public employee was a member of the civil service system, or the employee was granted a full post-termination evidentiary hearing by some other statutory scheme.[112] The *Townsel* court overlooked the importance of such a distinction.

Though absent from the *Townsel* court's analysis, determining the minimum requirements for post-termination procedural due process requires a balancing of the three factors set forth in *Mathews v. Eldridge*.[113] Whether or not the employee has a *statutory* right to a post-termination evidentiary hearing has a significant impact on this balancing test. The third factor in the test considers the administrative burdens imposed by additional procedural safeguards.[114] In terms of the *Townsel* case, the inquiry includes looking at the administrative burdens imposed by requiring a full, trial-like evidentiary hearing.

However, such an inquiry is *not necessary* in cases involving civil service employees or other employees granted a *statutory right* to full, trial-like evidentiary hearings. This is true because by granting the right to such hearings in statutes, legislatures have determined that they are not burdensome on the employing agency. In other words, where a statute requires particular procedures, the *Eldridge* balancing test does not take into account the burden of those procedures on the government.[115] Thus, in a case cited by the *Townsel* court, the United

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109. *See Kadushin*, 603 F. Supp. at 1151 (indicating that the question at issue was *whether* defendant should have provided plaintiff with a post-termination evidentiary hearing).

110. *See* discussion *supra* Part II.B.3.

111. *See supra* notes 94-95 and accompanying text (explaining that *Kelly* can be read as indicating that at a minimum, a post-termination hearing must be before an impartial decision-maker).

112. *See supra* note 44 and accompanying text.

113. 424 U.S. 319 (1976). For a discussion of the three factors, see *supra* note 40 and accompanying text.

114. *See Eldridge*, 424 U.S. at 335.

115. It is important not to confuse this point with the plurality opinion's "bitter with the sweet" analysis in *Arnett v. Kennedy*, 416 U.S. 134 (1974). According to that

States Court of Appeals for the Fourth Circuit found "it . . . hard to see how [the administrative burden caused by additional procedures] can be too great, in view of the fact that [Virginia] provides this opportunity to all employees covered by the Personnel Act."[116]

Unlike the cases where the legislature has already determined that there is no burden in providing full post-termination evidentiary hearings, *requiring* municipal agencies, such as the MTDB, to provide such hearings is contrary to the public interest and creates administrative burdens that upset the balance contemplated by *Eldridge*.

IV. THE *MATHEWS V. ELDRIDGE* FACTORS

As discussed in Part II, in order to determine whether a post-termination hearing satisfies the requirements of due process, a court must balance the following factors: (1) the private interest being affected by the government action; (2) the risk that the interest is being deprived erroneously and the value, if any, of additional safeguards; and (3) the public interest, including any burdens caused by the imposition of additional procedural requirements.[117] The *Townsel* court's requirement for a full, trial-like post-evidentiary hearing where the government must

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analysis, because a legislature was creating a property interest, it could at the same time define the procedures by which that property interest could be taken away. *See id.* at 151-54 (Rehnquist, J., plurality opinion). The analysis was rejected in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), which held that once a property interest was created, its deprivation was subject to constitutional, not statutory, procedural requirements. *See id.* at 541.

Concluding that a statutory right to a full, trial-like post-termination evidentiary hearing eliminates consideration of administrative burdens imposed by such a hearing is consistent with *Loudermill*. In rejecting *Arnett's* plurality opinion, *Loudermill* was concerned with legislatures creating statutory procedures that were insufficient to protect due process rights. *See id.* at 541. Statutory grants to full, trial-like post-evidentiary hearings, however, meet minimal constitutional procedural due process standards. Furthermore, by granting such hearings, legislatures are not engaging in defining what procedures are constitutionally necessary—they are merely providing safeguards in addition to those required by the Constitution. More importantly, consideration of the administrative burdens created by additional procedures is a constitutional analysis engaged in to determine whether such procedures are required. It is unnecessary to undertake such an analysis when those procedures are provided for by statute, because legislatures can impose requirements that exceed minimal constitutional protections.

116. Garraghty v. Virginia Dep't of Corrections, 52 F.3d 1274, 1283 (4th Cir. 1995); *see* Townsel v. San Diego Metro. Transit Dev. Bd., 77 Cal. Rptr. 2d 231, 235 (Ct. App. 1998) (citing *Garraghty*).

117. *See* Washington Teachers' Union v. Board of Educ., 109 F.3d 774, 780 (D.C. Cir. 1997) (citing *Eldridge*, 424 U.S. at 335).

affirmatively prove its discharge case exceeds the minimal requirements of post-termination procedural due process. A proper balancing of the *Eldridge* factors reveals that the post-termination hearing suggested by the *Townsel* court goes beyond the "appropriate procedural safeguards" contemplated by the Supreme Court.[118]

A. The Private Interest at Stake

The private interest at stake in the *Townsel* case was Rodric Townsel's continued employment with the San Diego Metropolitan Transit Development Board. This interest is a substantial one. The Supreme Court has recognized the "severity of depriving someone of his or her livelihood."[119] According to the Court, the "significance of the private interest in retaining employment cannot be gainsaid."[120] Such a view has been widely recognized.[121]

It is significant that Townsel was facing termination, and not merely a temporary suspension without pay.[122] Deprivation of his employment, if upheld, was to be permanent. The finality of the deprivation of the private interest at stake must be taken into account when determining what process is due.[123] Though significant, however, Townsel's interest in continued employment is not as high as other private interests. For example, in *Goldberg v. Kelly*,[124] the Supreme Court held that comprehensive procedures were required *before* terminating the private interest in continued welfare payments.[125] The court reasoned that unlike "the discharged government employee," terminating welfare benefits deprives "an *eligible* recipient of the very means by which to live."[126]

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118. *Loudermill*, 470 U.S. at 541 (quoting *Arnett*, 416 U.S. at 167 (Powell, J., concurring in part and concurring in result in part)).

119. FDIC v. Mallen, 486 U.S. 230, 243 (1988); *see* Brock v. Roadway Express, Inc., 481 U.S. 252, 263 (1987); *Loudermill*, 470 U.S. at 543.

120. *Loudermill*, 470 U.S. at 543.

121. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 932 (1997) (pointing out that Supreme Court opinions have "recognized the severity of depriving someone of the means of his livelihood"); Brock v. Roadway Express, Inc., 481 U.S. 252, 263 (1987) (stating employee's interest in retaining job is substantial); DeMichele v. Greenburgh Cent. Sch. Dist., 167 F.3d 784, 791 (2d Cir. 1999) (declaring employee's interest in tenured teaching position is substantial); *Garraghty*, 52 F.3d at 1282 (noting interest in continued employment is a substantive right); Texas Faculty Ass'n v. University of Texas, 946 F.2d 379, 384 (5th Cir. 1991) (citing *Loudermill*).

122. *See Gilbert*, 520 U.S. at 932 (distinguishing between termination and temporary suspension in consideration of procedural due process requirements).

123. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982) (taking into account both the length and the finality of the deprivation in determining what process is due).

124. 397 U.S. 254 (1970).

125. *See id.* at 264.

126. *Id.*

Townsel, however, does not find himself in such a dire situation by virtue of his termination. Not only are temporary programs such as welfare and unemployment compensation available to provide him with "the means for daily subsistence,"[127] but Townsel also has the ability to find other work.

Since "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands,'"[128] Townsel's interest in continued employment can be adequately protected by procedural safeguards less comprehensive than those provided in *Goldberg*. There is no question that the *Townsel* court's requirement for a full, trial-like evidentiary hearing where the MTDB must prove its termination case sufficiently safeguards Townsel's interest in continued employment. Whether procedural due process demands such a hearing, however, requires that Townsel's private interest be balanced against the remaining two factors.

B. The Risk of Erroneous Decisions and the Value of Additional Procedures

The second factor in the *Eldridge* balancing test looks at the risk of erroneously depriving a person of a property interest. To properly balance this factor, it is necessary to consider both the procedures made available to Townsel by the MTDB, and the value, if any, provided by the additional procedures required by the California Court of Appeal for the Fourth District.

1. The Procedures Provided by the MTDB

It is not entirely clear from the *Townsel* decision exactly what post-termination procedures were provided to Townsel by the MTDB. Furthermore, there is a conflict between the claims made by the parties in their respective briefs. Townsel claims that he was refused any type of post-termination evidentiary hearing,[129] while the MTDB claims that Townsel did receive a post-termination hearing "that spanned two

127. *Id.*
128. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
129. *See* Appellant's Opening Brief at 3, Townsel v. San Diego Metro. Transit Dev. Bd., 77 Cal. Rptr. 2d 231 (Ct. App. 1998) (No. D 026485).

days."[130] Since this Casenote seeks to identify the minimum post-termination procedural due process requirements, it assumes that the claims made by the MTDB are accurate. Thus, it is first necessary to examine what procedures the MTDB claims to have provided.

The MTDB Administrative Code permits employees to appeal personnel decisions to the MTDB Board of Directors.[131] In response to Townsel's request, the Board of Directors appointed a three-member committee to hear an appeal.[132] Townsel was represented by counsel and both sides were permitted to submit a pre-hearing brief.[133] During the hearing, he was "given the opportunity to make whatever statements or arguments [he and his lawyer] felt were necessary to convince the committee that Townsel's termination was in error."[134] Additionally, the MTDB provided evidence to the committee in the form of a report presented by MTDB's counsel.[135] Though he was "allowed to testify and had the opportunity to present witnesses and other evidence,"[136] there is no indication that Townsel was permitted to confront and examine adverse witnesses.

2. *The Risk of an Erroneous Decision*

Given Townsel's significant interest in continued employment, the procedural protections provided by the MTDB must be evaluated in light of the risk that Townsel's termination was erroneous. The courts have provided some limited guidance as to the minimum post-termination procedural requirements necessary to avert an erroneous deprivation of a significant private interest.

First, the United States District Court for the District of Rhode Island has recognized that "there can be no doubt that the opportunity for the employee to present his side of the story *prior to termination* may significantly reduce the risk of [an] erroneous [government] action."[137] Townsel was provided such opportunity by virtue of his pre-termination *Skelly* hearing. By providing notice and an opportunity to respond, pre-termination hearings such as *Skelly* hearings are intended to be an initial

130. Respondent's Brief at 15, *Townsel* (No. D 026485).
131. *See id.* at 9 (referencing MTDB Administrative Code and Regulations § 3.2.10).
132. *See id.* at 10.
133. *See id.* at 9.
134. *Id.* at 10.
135. *See* Appellant's Opening Brief at 3, *Townsel* (No. D 026485).
136. Respondent's Brief at 15-16, *Townsel* (No. D 026485).
137. DelSignore v. DiCenzo, 767 F. Supp. 423, 427 (D.R.I. 1991) (emphasis added) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985)).

check against mistaken decisions.[138]

Though *Loudermill* dealt with pre-termination procedural requirements, in that case the Supreme Court pointed out that "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision."[139] This observation, however, can be equally applied in the post-termination context. Since Townsel was allowed to present both witnesses and other favorable evidence during his post-termination hearing before the appeals committee, he was clearly given an opportunity to present his side of the story.

Several other factors have also been identified as minimum requirements for a post-termination hearing. For instance, several U.S. Circuit Courts of Appeal have held that such a hearing must be before an impartial tribunal.[140] Townsel was accorded such impartiality because the MTDB provided him a hearing in front of a neutral committee that reported to an equally neutral appeals board. Additionally, a formality requirement and a requirement that the government present evidence in support of its decision to terminate have both been identified as necessary components of post-termination procedural due process.[141] The appeals process established by the MTDB was a formal one. Parties submitted pre-hearing briefs, were represented by counsel, had the opportunity to present witnesses, could introduce favorable evidence, and responded to direct inquiries by the appeals board. In addition, the MTDB's counsel presented evidence to the appeals committee in support of its decision to discharge Townsel.[142] Thus, these additional requirements were also satisfied by the MTDB.

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138. *See Loudermill*, 470 U.S. at 545-46.

139. *Id.* at 543.

140. *See, e.g.*, Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 518 (10th Cir. 1998) ("A fundamental principle of procedural due process is a hearing before an impartial tribunal."); Clements v. Airport Auth., 69 F.3d 321, 333 (9th Cir. 1995) (holding that due process requires hearing before an impartial tribunal); Riggins v. Board of Regents of the Univ. of Neb., 790 F.2d 707, 712 (8th Cir. 1986) (recognizing hearing before an impartial board or tribunal as requirement of due process); Yashon v. Hunt, 825 F.2d 1016, 1026-27 (6th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (holding that due process entitles a person to have his case heard before a neutral tribunal).

141. *See* Kelly v. Smith, 764 F.2d 1412, 1416 (11th Cir. 1985), *overruled on other grounds by* McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (suggesting that informal hearings do not satisfy procedural due process); Figueroa v. Housing Auth., 182 Cal. Rptr. 497, 498-500 (Ct. App. 1982) (implying that evidence be presented to support the government's decision to discharge).

142. *See supra* Part IV.B.1.

One final requirement has been identified as a minimum requirement for post-termination hearings—the ability to confront and examine adverse witnesses.[143] This requirement is of particular importance in the *Townsel* case because Townsel's discharge was based on factual information regarding his conduct as an MTDB employee. Without the ability to confront and examine adverse witnesses in such a case where factual allegations are disputed, the risk of an erroneous termination is high. Thus, the U.S. Court of Appeals for the Tenth Circuit has declared that "[a] 'full post-termination hearing' is understood to include . . . the right to cross-examine adverse witnesses."[144] Although Townsel had the opportunity to call his own witnesses, there is no indication that he was given an opportunity to confront and examine adverse witnesses. For this reason, the post-termination hearing granted by the MTDB failed to provide Townsel with the minimal procedural safeguards required by due process.[145]

3. *The Value of the Additional Procedures Required by the* Townsel *Court*

The issue in *Townsel* could have been resolved at this point, had the *Townsel* court applied the *Eldridge* balancing test. However, the court went on to declare that procedural due process requires a full, trial-like evidentiary hearing where the government must prove its termination case for *all* permanent public employees *regardless* of whether they are members of the civil service or are granted such hearings by virtue of some other statutory scheme.[146]

Indirectly, the *Townsel* court's holding suggests several additional requirements that are necessary to satisfy post-termination procedural due process. Those additional safeguards include a burden on the government to affirmatively prove its termination case, and the necessity to subpoena witnesses and compel their testimony.[147] In order to

143. *See* Garraghty v. Virginia Dep't of Corrections, 52 F.3d 1274, 1283-84 (4th Cir. 1995) (rejecting sufficiency of post-termination hearing because terminated employee was not provided opportunity to confront and examine adverse witnesses).

144. Workman v. Jordan, 32 F.3d 475, 480 (10th Cir. 1994).

145. Part IV of this Casenote argues that procedural due process does not require that the MTDB subpoena witnesses. *See infra* Part IV.C.1.b. These two conclusions are not inconsistent. Although requiring the MTDB to subpoena witnesses imposes a burden on the public interest, this is only true for witnesses unaffiliated with the MTDB. Thus, Townsel could have been provided the opportunity to confront managers, co-workers, or other adverse MTDB witnesses without burdening the public interest. Since this was not done, procedural due process was not satisfied.

146. *See* Townsel v. San Diego Metro Transit Dev. Bd., 77 Cal. Rptr. 2d 231, 236 (Ct. App. 1998).

147. *See id.* at 236-37.

determine whether these additional safeguards are *required* by procedural due process, however, they must be weighed against the final factor in the *Eldridge* balancing test.

C. The Public Interest, Including the Burdens Imposed by Additional Procedures

Had the *Townsel* court properly engaged in balancing the three *Eldridge* factors, it could have concluded that Townsel's procedural due process rights were violated *without* broadly holding that *all* permanent public employees are entitled to full, trial-like post-evidentiary hearings *regardless* of whether they are members of the civil service or are granted such hearings by virtue of some other statutory scheme. Where not already provided for by civil service laws or other statutory schemes, requiring a burden on the government to affirmatively prove its termination case, and the necessity to subpoena witnesses and compel testimony weighs heavily on the public interest. Not only do such requirements fail to provide significant additional value to the procedures already in place, but they unnecessarily increase the cost of public employment and threaten the quality and nature of public employment. As a result, those additional safeguards contemplated by the *Townsel* court exceed the minimal requirements of post-termination procedural due process.

1. Public Burdens Imposed by the Townsel *Court's Additional Procedures*

The additional procedural safeguards imposed by the *Townsel* court create significant burdens on the public interest. As a result, they exceed minimal constitutional procedural due process requirements. To evaluate those additional procedural safeguards, any value they provide to ensuring an accurate decision must be weighed against the burden they impose on the public interest.

a. Placing the Burden of Proof on the Government

Few courts have addressed the constitutionality of placing the burden of showing lack of just cause upon a discharged public employee. Recently, however, the United States Court of Appeals for the Tenth

Circuit answered the question in *Benavidez v. Albuquerque*[148] by applying the *Eldridge* balancing test.[149] The court concluded that putting the burden of proof on the discharged employee during the post-termination hearing did not violate procedural due process.[150] Similarly, applying the balancing test to *Townsel* results in the conclusion that placing the burden of proof on the government during the post-termination hearing is not required by procedural due process.

Like the interest in *Townsel*, the Tenth Circuit recognized a significant private interest in retaining employment.[151] As to the second factor, the court evaluated the need for placing the burden of proof on the government in light of the pre-termination procedures provided to the discharged employee.[152] The court concluded:

> When the pre-termination process offers little or no opportunity for the employee to present his side of the case.... a post-termination hearing represents the only meaningful opportunity the employee has to challenge the employer's action, and requiring a dismissed employee to prove in this context that he was terminated without just cause may increase the risk of an erroneous deprivation.[153]

Thus, had Townsel been denied a meaningful opportunity to challenge the MTDB's action *before* termination, requiring the MTDB to prove its case *after* termination would admittedly reduce the risk of an erroneous decision. However, Townsel's *Skelly* hearing provided him with such a meaningful opportunity.

As required by law, prior to his termination, Townsel was given notice of the possibility he would be terminated, the reasons for the proposed action, a copy of the specific charges against him, and the right to respond either orally or in writing.[154] The Tenth Circuit referred to nearly identical procedures as "extensive."[155] As pointed out by the Tenth Circuit,

> when the employee has had a meaningful opportunity to explain his position and challenge his dismissal in pre-termination proceedings, the importance of the procedures in post-termination hearing is not as great. In this type of post-termination hearing, simply giving the employee "some opportunity" to present his side of the case "will provide a meaningful hedge against erroneous

148. 101 F.3d 620 (10th Cir. 1996).
149. *See id.* at 625-26.
150. *See id.* at 627-28.
151. *See id.* at 626.
152. *See id.*
153. *Id.*
154. *See supra* notes 10-12 and accompanying text.
155. *See Benavidez*, 101 F.3d at 627. The procedures provided in that case included written notice of the hearing and alleged violations, the ability to respond orally or in writing, and the right to retain counsel. *See id.*

action."[156]

Therefore, the pre-termination procedures provided to Townsel significantly reduced the risk of an erroneous decision at the post-termination hearing. Because the risk of error was minimized, Townsel was only entitled to "some opportunity" to present his side of the story. Thus, requiring the MTDB to affirmatively prove its case was constitutionally unnecessary.

Not only does requiring the MTDB to prove its termination case add little to no value to the procedures already provided Townsel, but such a requirement also imposes administrative burdens on the government. Admittedly, placing the burden of proof on the MTDB would not require additional hearings or investigation. A post-termination hearing is already required by MTDB procedures and, in order to get to that stage, the MTDB would have already compiled evidence in support of its decision to terminate. Nonetheless, any city has a strong interest in maintaining a competent workforce. The inability to efficiently remove problem employees would not only increase the cost of public employment, but would also result in poorly run government operations, such as the San Diego Trolley. As the Supreme Court has observed, it is a "common-sense realization that government offices could not function if every employment decision became a constitutional matter."[157]

A proper balancing of the *Eldridge* factors therefore reveals that placing the burden on the MTDB to prove its case at the post-termination hearing was not required by procedural due process. By requiring this additional procedural safeguard, the *Townsel* court not only failed to reduce the risk of an erroneous decision, but also imposed administrative burdens upon the MTDB. Contrary to the court's holding, procedural due process does not require in *all* cases that the government prove its termination case during the post-termination phase of discharging a permanent public employee.

b. The Necessity to Subpoena Witnesses and Compel Their Testimony

Similar to the issue of burden of proof, requiring the MTDB to

156. *Id.* at 626 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 n.8 (1985)).

157. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989) (quoting O'Connor v. Ortega, 480 U.S. 709, 722 (1987) (quoting Connick v. Myers, 461 U.S. 138, 143 (1983))).

subpoena witnesses adds little value to the procedures already in place, and imposes an administrative burden on the public interest. As a result, there is no procedural due process requirement that such a safeguard be provided in all cases.

The right to confront adverse witnesses has been identified as a necessary component of post-termination procedural due process.[158] This requirement can be met, however, without the government employer issuing subpoenas, especially when the testimony of third-party witnesses adds little to the accuracy of the termination decision. In cases where the dismissal charges are solely based on factual allegations made by third-party witnesses, subpoenaing those witness is arguably necessary to insure the discharged employee's ability to confront and examine adverse witnesses. Townsel's dismissal, however, was not "solely or even primarily"[159] based on the battery charges arising from the March 5, 1994 incident.[160]

According to the MTDB's general manager, Townsel was being discharged not for allegedly assaulting trolley passengers, but for violating several MTDB rules in connection with the incident.[161] Moreover, Townsel's alleged assault on two female San Diego Trolley passengers "was just one in a long series of well documented problems Mr. Townsel had in dealing with the public, co-workers and supervisory staff."[162] Townsel had a history of engendering complaints and violating MTDB rules.[163] Thus, there was arguably sufficient cause to discharge Townsel without the testimony of the two female passengers. However, even if the MTDB relied in part on the passengers' testimony, the Supreme Court has recognized that property interests can be constitutionally terminated even when based on hearsay evidence.[164]

Not only is the subpoenaing of third-party witnesses constitutionally

158. *See supra* note 101 and accompanying text.

159. Respondent's Brief at 9, Townsel v. San Diego Metro. Transit Dev. Bd., 77 Cal. Rptr. 2d 231 (Ct. App. 1998) (No. D 026485) (quoting Letter from Thomas Larwin, MTDB General Manager, to Rodric Townsel (Mar. 31, 1995) (explaining the reasons for Townsel's discharge)).

160. For a review of the facts of the incident, see *supra* note 9 and accompanying text.

161. *See* Respondent's Brief at 9, *Townsel* (No. D 026485) (discussing Letter from Thomas Larwin, MTDB General Manager, to Rodric Townsel (Mar. 31, 1995) (explaining the reasons for Townsel's discharge)).

162. *Id.* at 9 (quoting Letter from Thomas Larwin, MTDB General Manager, to Rodric Townsel (Mar. 31, 1995) (explaining the reasons for Townsel's discharge)); *see supra* note 9 (describing additional incidents in Townsel's employment history).

163. *See* Respondent's Brief at 3-5, *Townsel* (No. D026485) (describing in detail Townsel's employment history); *see also supra* note 9 (highlighting some of Townsel's employment history).

164. *See, e.g.*, Richardson v. Perales, 402 U.S. 389, 402-10 (1971) (allowing the termination of Social Security benefits based on hearsay evidence).

unnecessary, but such a requirement would fail to add any value to the procedures already in place. Subpoenaing witnesses arguably protects against an arbitrary or capricious decision, but the government has an incentive not to arbitrarily discharge public employees. Doing so would increase the cost of public employment because of the necessity to find, hire, and train new employees.[165] Even if the possibility of an arbitrary dismissal exists, there are mechanisms already in place to alleviate such a risk. MTDB employees could only be removed for cause. Necessarily, something more than caprice was needed to discharge Townsel. In addition, he was provided a pre-termination hearing intended to act as an initial check against an erroneous decision. Finally, Townsel was given the opportunity to present his side of the story in front of an impartial review board. These procedures weigh heavily against an arbitrary or capricious discharge.

Most importantly, the MTDB could have easily satisfied Townsel's right to confront adverse witnesses by allowing him to question MTDB personnel. Since Townsel's dismissal was based on rule violations stemming from a history of complaints, Townsel should have had the opportunity to question his manager, supervisors, and other MTDB employees upon whose testimony the MTDB relied. Unlike subpoenaing third-party witnesses, providing Townsel with this opportunity would have satisfied the minimal requirements of procedural due process without imposing an administrative burden on the MTDB.

Requiring internal personnel to appear at a post-termination hearing imposes little burden on the MTDB. Compelling the appearance of such witnesses could be done quickly and easily without burdening the MTDB financially. Requiring the MTDB to subpoena third-party witnesses, however, imposes considerable burden upon the MTDB. First, time, effort, and money must be expended to locate third-party witnesses. More importantly, requiring such a procedure in all cases would greatly impact the government's interest in maintaining a competent work force. The termination process would become time-consuming and costly. This would not only reduce the government's ability to quickly discharge problem employees such as Townsel, but would also increase the overall cost of public employment. If small

165. *See generally* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (discussing the marketplace economic disincentives for firing employees without cause).

municipal government agencies such as the MTDB were forced to comply with such broad post-termination procedures, it may even lead to a reduction of permanent or tenured public employment, since such procedures would not apply to at-will employees. Being forced to operate in an at-will system, however, would further increase the cost of public employment. Thus, the burden on the MTDB clearly outweighs any value or necessity in requiring the subpoenaing of third-party witnesses.

A balancing of the *Eldridge* factors therefore reveals that while Townsel has a significant interest in continued employment, such an interest is outweighed by the MTDB's interest in an efficient and competent public employment system. As a result, requiring the government to prove its termination case at the post-termination hearing, and forcing it to subpoena third-party witnesses, goes beyond the minimal procedural safeguards contemplated by *Eldridge*.

V. CONCLUSION

The *Townsel* court reached the correct result, but for the wrong reasons. Because Townsel was not provided the opportunity to confront adverse MTDB witnesses, he was not provided the minimal post-termination safeguards required by the due process clause of the Fourteenth Amendment. For this reason, the result of *Townsel* was correct.

Nonetheless, the *Townsel* court reached its decision not by properly balancing the three factors set forth in *Mathews v. Eldridge*,[166] but by broadly concluding that all permanent public employees have a constitutional right to a full, trial-like post-evidentiary hearing where the government must prove its termination case, regardless of whether such a hearing is provided by statute. This type of hearing, while clearly adequate to protect a public employee's due process rights, is not required by procedural due process in all circumstances. Post-termination evidentiary hearings that fall short of the type envisioned by the *Townsel* court are constitutionally sufficient so long as they meet certain minimal procedural safeguards. Requiring the government to prove its termination case and requiring the government to subpoena third-party witnesses are not among these minimal procedural safeguards. Consequently, the California Court of Appeal for the Fourth District's holding in *Townsel v. San Diego Metropolitan Transit*

166. 424 U.S. 319 (1976).

Development Board[167] created an overly broad Constitutional standard that goes beyond the minimum requirements of post-termination procedural due process.

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167. 77 Cal. Rptr. 2d 231 (Ct. App. 1998).


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