SUPREME COURT OF THE UNITED STATES

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350 U.S. 551

Slochower v. Board of Higher Education of New York City

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 23 Argued: October 18-19, 1955 --- Decided: April 9, 1956

MR. JUSTICE CLARK delivered the opinion of the Court.

This appeal brings into question the constitutionality of § 903 of the Charter of the City of New York. That section provides that, whenever an employee of the City utilizes the privilege against self-incrimination to avoid answering a question relating to his official conduct, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.[n1]

Appellant Slochower invoked the privilege against self-incrimination **[p553]** under the Fifth Amendment before an investigating committee of the United States Senate, and was summarily discharged from his position as associate professor at Brooklyn College, an institution maintained by the City of New York. He now claims that the charter provision, as applied to him, violates both the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment.

On September 24, 1952, the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate held open hearings in New York City. The investigation, conducted on a national scale, related to subversive influences in the American educational system. At the beginning of the hearings, the Chairman stated that education was primarily a state and local function, and therefore the inquiry would be limited to "considerations affecting national security, which are directly within the purview and authority of the subcommittee." Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of Senate Committee on the Judiciary, 82d Cong., 2d Sess. 1. Professor Slochower, when called to testify, stated that he was not a member of the Communist Party, and indicated complete willingness to answer all questions about his associations or political beliefs since 1941. But he refused to answer questions concerning his membership during 1940 and 1941 on the ground that his answers might tend to incriminate him. The Chairman of the Senate Subcommittee accepted Slochower's claim as a valid assertion of an admitted constitutional right.

It had been alleged that Slochower was a Communist in 1941 in the testimony of one Bernard Grebanier before the Rapp-Coudert Committee of the New York Legislature. *See Report of the Subcommittee of the Joint Legislative Committee to Investigate Procedures and Methods of* **[p554]** *Allocating State Moneys for Public School Purposes and Subversive Activities,* Legislative Document (1942), No. 49, State of New York, at 318. Slochower testified that he had appeared twice before the Rapp-Coudert Committee, and had subsequently testified before the Board of Faculty relating to this charge. He also testified that he had answered questions at these hearings relating to his Communist affiliations in 1940 and 1941.

Shortly after testifying before the Internal Security Subcommittee, Slochower was notified that he was suspended from his position at the College; three days later, his position was declared vacant "pursuant to the provisions of Section 903 of the New York City Charter."[*]

Slochower had 27 years' experience as a college teacher, and was entitled to tenure under state law. McKinney's New York Laws, Education Law, § 6206(2). Under this statute, appellant may be discharged only for cause, and after notice, hearing, and appeal. § 6206(10). The Court of Appeals of New York, however, has authoritatively interpreted § 903 to mean that "the assertion of the privilege against self-incrimination is equivalent to a resignation." *Daniman v. Board of Education,* 306 N.Y. 532, 538, 119 N.E.2d 373, 377. Dismissal under this provision is therefore automatic, and there is no right to charges, notice, hearing, or opportunity to explain.

The Supreme Court of New York, County of Kings, concluded that appellant's behavior fell within the scope of § 903, and upheld its application here. 202 Misc. 915, 118 N.Y.S.2d 487. The Appellate Division, 282 App.Div. 718, 122 N.Y.S.2d 286, reported *sub nom. Shlakman v. Board,* and the Court of Appeals, reported **[p555]** *sub nom. Daniman v. Board, supra,* each by a divided court, affirmed. We noted probable jurisdiction, **348 U.S. 935**, because of the importance of the question presented.[n2]

Slochower argues that § 903 abridges a privilege or immunity of a citizen of the United States since it in effect imposes a penalty on the exercise of a federally guaranteed right in a federal proceeding. It also violates due process, he argues, because the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the State to terminate his employment. Appellee insists that no question of "privileges or immunities" was raised or passed on below, and therefore directs its argument solely to the proposition that § 903 does not operate in an arbitrary or capricious manner. We do not decide whether a claim under the "privileges or immunities" clause was considered below, since we conclude the summary dismissal of appellant in the circumstances of this case violates due process of law.

The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. *Adler v. Board of Education,* **342 U.S. 485**, upheld the New York Feinberg Law, which authorized the public school authorities to **[p556]** dismiss employees who, after notice and hearing, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim.[n3] Likewise, *Garner*

v. Los Angeles Board, **341 U.S. 716**, 720, upheld the right of the city to inquire of its employees as to "matters that may prove relevant to their fitness and suitability for the public service," including their membership, past and present, in the Communist Party or the Communist Political Association. There it was held that the city had power to discharge employees who refused to file an affidavit disclosing such information to the school authorities.[n4]

But, in each of these cases, it was emphasized that the State must conform to the requirements of due process. In *Wieman v. Updegraff,* **344 U.S. 183**, we struck down a so-called "loyalty oath" because it based employability solely on the fact of membership in certain organizations. We pointed out that membership itself may be innocent, and held that the classification of innocent and guilty together was arbitrary.[n5] This case rests squarely on the proposition that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 192.

Here, the Board, in support of its position, contends that only two possible inferences flow from appellant's claim **[p557]** of self-incrimination: (1) that the answering of the question would tend to prove him guilty of a crime in some way connected with his official conduct; or (2) that, in order to avoid answering the question, he falsely invoked the privilege by stating that the answer would tend to incriminate him, and thus committed perjury. Either inference, it insists, is sufficient to justify the termination of his employment. The Court of Appeals, however, accepted the Committee's determination that the privilege had been properly invoked, and it further held that no inference of Communist Party membership could be drawn from such a refusal to testify. It found the statute to impose merely a condition on public employment, and affirmed the summary action taken in the case. With this conclusion, we cannot agree.

At the outset, we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as "one of the most valuable prerogatives of the citizen." *Brown v. Walker,* **161 U.S. 591**, 610. We have reaffirmed our faith in this principle recently in *Quinn v. United States,* **349 U.S. 155**. In *Ullmann v. United States,* **350 U.S. 422**, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann,* a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might **[p558]** be ensnared by ambiguous circumstances. *See* Griswold, The Fifth Amendment Today (1955).

With this in mind, we consider the application of § 903. As interpreted and applied by the state courts, it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect, the questions asked are taken as confessed, and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their

constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman v. Updegraff, supra.*

It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at "the property, affairs, or government of the city, or . . . official conduct of city employees." In this respect, the present case differs materially from *Garner,* where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record, the Board cannot claim that its action was part of a *bona fide* attempt to gain needed and relevant information.

Without attacking Professor Slochower's qualification for his position in any manner, and apparently with full knowledge of the testimony he had given some 12 years **[p559]** before at the state committee hearing, the Board seized upon his claim of privilege before the federal committee and converted it through the use of § 903 into a conclusive presumption of guilt . Since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support. There has not been the "protection of the individual against arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process. *Ohio Bell Telephone Co. v. Commission,* **301 U.S. 292**, 302.

This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join the Court's judgment and opinion, but also adhere to the views expressed in their dissents in *Adler v. Board of Education* and *Garner v. Los Angeles Board, supra,* and to their concurrences in *Wieman v. Updegraff, supra.*

* [Reporter's Note: A sentence which was reported in the Preliminary Print at p. 554, lines 13-18, was deleted by an order of the Court entered May 28, 1956, 351 U.S. 944.]

1. The full text of § 903 provides:

If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the

city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency .

2. Thirteen other individuals brought suit for reinstatement after their dismissal for pleading the privilege against self-incrimination in the same federal investigation. We dismissed the appeal of these individuals "for want of a properly presented federal question." Daniman v. Board, 348 U.S. 933. See Daniman v. Board, 307 N.Y. 806, 121 N.E.2d 629, where the New York Court of Appeals declined to amend its remittitur to state that a federal question had been presented and passed on as to these appellants, but did so amend its remittitur as to Slochower.

3. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissented. MR. JUSTICE FRANKFURTER dissented on grounds of standing and ripeness.

4. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissented. MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON concurred in this aspect of the case, but dissented from other portions of the decision in separate opinions.

5. MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER concurred in separate opinions in which MR. JUSTICE DOUGLAS joined. MR. JUSTICE BURTON concurred in the result.

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