Employment Law: Classification in Oklahoma Public Employment: Does it Really Matter

Tom Ivester

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

Part of the Labor and Employment Law Commons

Recommended Citation

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
Employment Law: Classification in Oklahoma Public Employment: Does It Really Matter?

I. Introduction

In 1959, Oklahoma created the Merit System of Personnel Administration (Merit System). This Act established the first uniform system of job classification and discharge and suspension procedures for Oklahoma state employees. Before the Oklahoma legislature passed this Act, each state agency or department had its own rules and regulations concerning employment status and discharge and suspension procedures. Once enacted, the Merit System provided certain state employees specific protections (e.g., it required just cause for removing employees). The system’s goal was to establish a stable and experienced government work force.

The 1959 statute delineated which offices and positions fell under the Merit System (classified employees) and those which did not fall under the Merit System (unclassified employees). The statute also specified that the chief administrative officer of each state agency was responsible for designating classified positions within the agency. A 1994 amendment to the statute defined "classified service" as state employees and positions under the jurisdiction of the Merit System. The amendment further defined "unclassified service" or "exempt service" as those employees and positions excluded from coverage under the Merit System.

Today, Oklahoma has a comprehensive set of statutes governing all aspects of public employment in Oklahoma. The Oklahoma Personnel Act deals with the status and job classifications of employees. Section 840-6.5 of the Personnel Act specifically addresses discharge and suspension procedures. A separate Oklahoma statute, title 51, section 24.1, also stipulates discharge and suspension procedures for officers or employees of the state.

These two statutes appear to overlap, but section 840-6.5 limits any suspension of a classified employee to a time not to exceed sixty days. Conversely, section 24.1 allows for an indefinite suspension of all state employees convicted of a felony, regardless of classification. These two statutes conflict when a classified employee

2. See id. § 809 (repealed 1982).
3. See id. §§ 803, 808 (repealed 1982).
5. See 74 Okla. Stat. § 840-1.3.
6. See id.
8. See id.
9. See id. §§ 840-4.1 to -6.2, 6.5.
is convicted of a felony. The Supreme Court of Oklahoma addressed this conflict in the 1998 case of *State v. Ferrell.*

In *Ferrell*, the Oklahoma Military Department fired a classified state employee following an investigation for misuse of state funds. An administrative law judge later found the discharge wrongful and ordered the Military Department to rehire the employee. The employee then filed for back pay between the time of the discharge and the time of reinstatement. The Military Department refused the back pay request. Declining to apply a statute specifically governing the discharge of classified employees, the Supreme Court of Oklahoma upheld the agency's decision to deny the back pay.

In *Ferrell*, the supreme court settled a conflict between two Oklahoma statutes that regulate discharge and suspension procedures for public employees. While one statute provides specific protections for classified employees under the state's Merit Protection System, the other statute provides no such protections and ostensibly applies to all state employees, regardless of classification. The supreme court decided in favor of the latter statute and held that the state no longer affords the screen of the Merit System to classified employees convicted of a felony.

The Supreme Court of Oklahoma correctly held that section 24.1 of the Oklahoma Statutes applies to all state employees, regardless of classification. However, the court's failure to address the back pay issue raises serious questions as to Oklahoma's position on back pay and wages for wrongful termination. Part II of this note discusses the history of Oklahoma law prior to *Ferrell*, offering insight into the reasoning of the *Ferrell* court. Part III outlines the reasoning behind the court's decision. In Part IV, an examination of *Ferrell* presents the possible impact the decision could have on Oklahoma state employees. Finally, Part V suggests that *Ferrell* could have an adverse effect on Oklahoma public employees and the status of the law in Oklahoma.

**II. Historical Background**

**A. Civil Service and Due Process in Public Employment Law**

Classified state employees enjoy protections that their private sector counterparts do not. For example, the State of Oklahoma ensures job security for state employees through the Merit Protection System. The United States Constitution also limits the way in which a public employer can deal with its employees. A review of

---

14. See *id.* at 579.
15. See 74 OKLA. STAT. § 840-6.5 (Supp. 1999).
17. See *Ferrell*, 959 P.2d at 578-79.
19. See *id.* at 337-38.
United States Supreme Court decisions addressing public employment identifies these constitutional limits.

In its earliest public employment decisions, the Supreme Court reasoned that unless otherwise provided by statute, public employees are merely employees-at-will. At-will employment means that any employment contract not for a definite time is terminable at will by either party for any reason, good or bad, or for no reason. "[T]he power of removal is incident to the power of appointment." In the early 1950s, however, the Supreme Court began to apply due process protections to public employment and move away from employment-at-will. In the 1952 case of Wieman v. Updegraff, the Supreme Court struck down an Oklahoma statute requiring all state employees to sign a loyalty oath avowing that they had never been associated with any Communist or subversive group. The Court reasoned that a state may not condition employment on membership rosters unless the state gives the person the opportunity to explain the circumstances surrounding the membership. The basis of the Court's decision in Wieman was that constitutional protection extends to the public employee when the state treats the employee in an arbitrary or discriminatory manner.

The Wieman decision was a precursor to several Supreme Court rulings that individual states could not withhold employment or terminate employees who had a property interest in employment without applying constitutional due process

20. See Reagan v. United States, 182 U.S. 419, 425 (1901) (stating public employees subject to removal "at the will of the power appointing them" unless any causes of removal are prescribed by law); Parsons v. United States, 167 U.S. 324, 343 (1897) (recognizing and applying at-will doctrine); Ex parte Hennen, 38 U.S. 230, 258 (1839) (stating public officers are "removable at pleasure ... without requiring any cause for such removal").


26. See Wieman, 344 U.S. at 190. The court stated:

But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. "They had joined, [but] did not know what it was, they were good, fine young men and women, loyal Americans, but they had been trapped into it because one of the great weaknesses of all Americans, whether adult or youth, is to join something . . . ."

Id. (quoting Hearings on H.R. 1884 and H.R. 2122 Before House Comm. on Un-American Activities, 80th Cong., 1st Sess. 46 (1962) (testimony of J. Edgar Hoover)).

27. See id. at 192.

28. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created
procedures.29 In the landmark case of Cleveland Board of Education v. Loudermill,20 the Supreme Court held that an employer cannot discharge a tenured public employee without some pretermination right to respond to the charges, regardless of the procedures set forth in the state statute.21

In Loudermill, the Cleveland Board of Education fired a security guard for failing to disclose a prior felony conviction on his job application.22 The guard appealed, and in a post-termination hearing, the Cleveland Civil Service Commission upheld the dismissal.23 The Loudermill Court reasoned that public employees' constitutional claims depend on their having had a property right in continued employment.24 Further, if the employee does have a property right, then a state cannot deprive him of this property without due process.25 The Court explained that since the guard was a classified civil service employee, he possessed a property interest in continued employment.26 The Court concluded that public employees with property interests in continued employment have a constitutional due process right to a pretermination hearing.27

Since Loudermill, pretermination proceedings have developed into a means of providing "the employing agency with information from which it may determine whether reasonable grounds exist to believe the charges against the employee are true."28 This pretermination proceeding is not a trial.29 A full adversarial eviden-

by the Constitution [but] are defined by existing rules or understandings that stem from an independent source such as state law[,] rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."); see also Peter N. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 CAL. L. REV. 146, 192 (1983) (arguing that sovereign states define terms of property rights, but federal courts are "ultimate arbiters" of constitutional due process). See generally Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 319 (1st Cir. 1989) (stating that "[t]he sufficiency of a claim of entitlement to a property interest in public employment must be measured by and decided with reference to local law").

29. See Perry v. Sindermann, 408 U.S. 593, 601 (1972) (holding that a public employee with a property interest is entitled to due process guarantees). But see Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972) (stating that property interests are not created by the United States Constitution but rather by existing rules such as state law and that Wisconsin statutes do provide for a property interest of non-tenured state professors).


31. See id. at 540-41.

32. See id. at 535. The security guard stated on his job application that he had never been convicted of a felony. See id. In fact, he had been convicted of grand larceny in 1968. See id. The guard argued that he had not knowingly lied on the application. See id. He maintained that he had mistakenly thought his 1968 conviction, which resulted in only a fine and six-month suspended sentence, was for a misdemeanor, rather than a felony. See id.

33. See id. at 535-36.

34. See id. at 538.

35. See id.

36. See id. at 538-39.

37. See id. at 542.

38. Daniel J. Gamino, State Employee Discipline: Can the Law Level the Playing Field Between David and Goliath?, 68 OKLA. B.J. 3411, 3411 (1997). But see N.J. REV. STAT. § 11A:2-13 (1993) (providing that a New Jersey public employee may be suspended without a hearing pending disposition of criminal proceedings when he or she is charged with a crime of sufficient seriousness or one which
tiary hearing is not required. Rather, the proceeding is merely an initial check against mistaken decisions. The standard of proof is whether by a preponderance of the evidence there are reasonable grounds to believe the charges are true.

Agency pretermination practices vary significantly. "Some agencies have the ultimate decision-maker personally preside at the pre-termination proceeding." Generally, "agencies appoint an attorney or intermediate officer to take the evidence and report to the appointing authority." The agency may also have a complete set of rules outlining the pretermination procedures.

B. Oklahoma At-Will Doctrine and the Merit Protection System

While the United States Supreme Court moved toward providing due process protection for public employees, Oklahoma also took steps to provide additional protection for state employees. Oklahoma's 1959 adoption of the Merit System created such protection. As codified from the 1959 Act, the Merit System's stated purpose was "to provide all citizens a fair and equal opportunity for public service, to establish conditions of service which will attract officers and employees of character and ability."

The Merit System statute also provides that a state agency may terminate an employee in the classified service only for cause. Classified service refers to "state employees and positions under the jurisdiction of the Oklahoma Merit System of Personnel Administration." The chief administrative officer of each state agency, the appointing authority, is responsible for designating classified positions within the agency. The 1959 Merit System statute outlined the specific offenses for which an employer could terminate a classified employee. Some offenses included

39. See Loudermill, 470 U.S. at 545 (stating that some kind of hearing must be held).
40. See id. at 545-46; see also Goss v. Lopez, 419 U.S. 565, 582 (1975) (holding that a hearing for suspension of students at a school may be as little as an informal opportunity for the student to tell his side of the story); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1145 (3d Cir. 1988) (stating that a pre-termination hearing is proper when it consists of asking the officer for his explanation when a urine sample reveals inhalation of marijuana).
41. See Loudermill, 470 U.S. at 545-56.
42. See id.
43. Gamino, supra note 38, at 3411.
44. Id.
45. See id.
47. See 74 OKLA. STAT. § 840-6.5 (Supp. 1999).
48. Id. § 840-1.3(7).
49. See id. § 840-1.3(3).
50. See id. § 840-4.3.
51. See id. § 812. The statute stated:

The State Personnel Board by rule shall establish a procedure in accordance with the provisions of this Act for the suspension, reduction in pay, demotion, and discharge of employees in the classified service for misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful violation of the provisions of the rules proscribed by this Act or the State Personnel
misconduct, insubordination, and conduct unbecoming a public employee.\textsuperscript{52} A 1984 amendment changed the statute and added a sixty-day maximum period for suspension without pay for any classified employee.\textsuperscript{53}

Under the standard put forth in \textit{Loudermill}, a classified employee discharged for any of the reasons identified in the Merit System statute is entitled to a pretermination hearing concerning the discharge.\textsuperscript{54} This right to a hearing is also codified in title 74, section 840-6.5(B):

Before any [termination] action is taken against a permanent classified employee, the employing agency . . . shall provide the employee with a written statement of the specific acts or omissions that are causes or reasons for the proposed action, an explanation of the agency's evidence, and an opportunity to present reasons why the proposed action is improper.\textsuperscript{55}

\textbf{C. State Officer and Employees}

While the Merit System gave protections to certain state employees, in 1965 the Oklahoma legislature adopted a separate statute, title 51, section 24.1, relating directly to the suspension of state officers and employees.\textsuperscript{56} This statute, while not

\begin{flushleft}
\textit{Id.}, conduct unbecoming a public employee, conviction of a crime involving moral turpitude, or any other just cause.
\end{flushleft}

\textit{Id.}

\textsuperscript{52} See \textit{id}.

\textsuperscript{53} 74 OKLA. STAT. § 840-6.5(B). The amendment reads:

\begin{quote}
Any employee in the classified service may be discharged, suspended without pay for not to exceed sixty (60) calendar days, or demoted by the agency, department, institution, or officer by whom employed for misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful violation of the Oklahoma Personnel Act or of the rules prescribed by the Office of Personnel Management or by the Oklahoma Merit Protection Commission, conduct unbecoming a public employee, conviction of a crime of moral turpitude, or any other just cause.
\end{quote}

\textit{Id.}


\textsuperscript{55} 74 OKLA. STAT. § 840-6.5(B).


Section 1. Suspension from office or employment upon conviction of felony

From and after the effective date of this act, any elected or appointed state officer or employee who, during the term for which he was elected or appointed, is, or has been, found guilty by a trial court of a felony in a court of competent jurisdiction shall be automatically suspended from said office or employment. Such suspension shall continue until such time as said conviction is reversed by the highest appellate court to which said officer or employee may appeal.

Section 2. Rejection of salary claims — Payment of back salary on reversal

The State Budget Officer is hereby directed to reject all claims for payment of salary or wages to any such officer or employee during the period. Provided however, that in the event of reversal of any conviction upon appeal, all claims for payment of salary or wages during such period of suspension shall be allowed.
within the Merit System, mandated that agencies suspend any elected or appointed state officer or employee found guilty of a felony.\textsuperscript{57} The statute provided for indefinite suspension, without pay, of an employee convicted of a felony.\textsuperscript{58} The statute further stated that in the case of the reversal of a conviction, an agency shall allow all claims for salary or wages that accrued during the suspension period.\textsuperscript{59} However, in a 1981 amendment the Oklahoma legislature deleted this back pay provision in the case of a conviction reversal.\textsuperscript{60}

In 1981 a controversy developed as to whether this statute also applied to county employees.\textsuperscript{61} The Governor of Oklahoma called a special session of the Oklahoma legislature. He requested the session primarily to implement legislation concerning a large number of county commissioners under indictment in federal court. The Governor asked the Oklahoma legislature to amend section 24.1 to include county officers and employees in the list of individuals automatically suspended upon a felony conviction.\textsuperscript{62} The Oklahoma legislature did amend section 24.1 and added language that mandated a suspension for state or county officers or employees who plead guilty or nolo contendre in a state or federal court.\textsuperscript{63}

In \textit{Young v. Town of Morris},\textsuperscript{64} a 1915 case, the Supreme Court of Oklahoma decided that the right to salary attaches to the public officer irrespective of protracted absence or nonperformance of duties.\textsuperscript{65} The court also stated, however, that the Oklahoma legislature may statutorily modify this right to salary.\textsuperscript{66} Section 24.1 modifies this right to salary by providing for suspension of a public officer or employee without pay.\textsuperscript{67} Section 24.1 allows for this suspension until the highest applicable appellate court either affirms or reverses the conviction or guilty plea.\textsuperscript{68} Title 74, section 840-6.5 of the Oklahoma Statutes also allows for suspension without pay but only for a period not to exceed sixty days.\textsuperscript{69} The two statutes did not appear

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See id.
\item See id.
\item See id.
\item See Worley v. State, 558 P.2d 430, 433 (1976) (holding that the 1971 version of section 24.1 applied only to officers or employees compensated through the state budget officer and does not apply to county commissioners).
\item See 51 OKLA. STAT. § 24.1 (Supp. 1999). The amendment added a sentence reading as follows: In the event any elected or appointed state or county officer or employee who, during the term for which he was elected or appointed, pleads guilty or nolo contendre to a felony or any offense involving a violation of his official oath in a state or federal court of competent jurisdiction, he shall, immediately upon the entry of said plea, forfeit said office or employment.
\item Id.
\item 150 P. 684 (Okla. 1915).
\item See id. at 686.
\item See id.
\item See 51 OKLA. STAT. § 24.1(A).
\item See id.
\item See id.
\item See 74 OKLA. STAT. § 840-6.5(B) (Supp. 1999).
\end{enumerate}
\end{footnotesize}
to conflict until 1990, when the Oklahoma Military Department denied John Porter back wages under section 24.1, an action giving rise to the case of State v. Ferrell.

III. State v. Ferrell

A. Facts

In State v. Ferrell, the Oklahoma Military Department discharged John Porter, a permanent classified employee, in 1988 following an investigation by the Attorney General's Office into "allegations of self-dealing and misuse of state funds." The employee filed an appeal with the Merit Protection Commission. An administrative law judge reduced the discharge to a thirty-day suspension. The Military Department reinstated the employee in May 1990.

In October 1991, however, a trial court convicted the employee of thirty-six felony counts of filing false travel claims. In January 1992, the employee pled nolo contendre to eleven felony counts of embezzlement of state funds and destruction of public records. All criminal acts occurred prior to the employee's termination in 1988. Pursuant to title 51, section 24.1 of the Oklahoma Statutes, the Military Department again discharged the employee based on his felony convictions. The employee then filed an action with the Merit Protection Commission for back pay, wages and benefits for the period of December 1988 through February 1992, the time between the two discharges.

The Merit Protection Commission decided that title 74, section 840-6.5 was the only applicable provision to the discharge of a permanent classified state employee and that title 51, section 24.1 was not controlling. The district court came to the same conclusion and ordered the payment of Porter's back wages, benefits, and interest. The Court of Civil Appeals affirmed the ruling, and the Supreme Court of Oklahoma granted certiorari.

B. Issue

The issue presented to the Supreme Court of Oklahoma was whether section 840-6.5 took "precedence over section 24.1 . . . with respect to a classified state employee's discharge and forfeiture of wages based upon a felony conviction." To determine this question the court faced two preliminary issues: first, whether it was possible to construe the statutes as consistent with one another; and second, whether by its terms, section 24.1 applies to all state employees regardless of their classification.

71.  See id.
72.  See id.
73.  See id.
74.  See id.
75.  See id.; see also Appellee's Petition for Rehearing on Certiorari at 15, State v. Ferrell, 959 P.2d 576 (Okla. 1998) (No. 82,011).
76.  Ferrell, 959 P.2d at 577.
C. Holding

The Supreme Court of Oklahoma held that the two provisions did not conflict.\textsuperscript{77} The court stated that section 24.1 operates "as an overarching provision applicable to all state and county officers and employees without regard to whether one of the grounds for discipline enumerated in section 840-6.5(B) Title 74 is also present."\textsuperscript{78} The court further held that "section 24.1's forfeiture provisions merely augment the discipline and discharge procedures for permanent classified employees found in section 840-6.5."\textsuperscript{79}

D. Analysis

1. Majority Opinion

The Ferrell court began its analysis by addressing the statutory construction of the two statutes.\textsuperscript{80} "The 'fundamental rule' of statutory construction is to ascertain the intent of the [Oklahoma] Legislature and [i]f possible construe them so as to render them consistent with one another."\textsuperscript{81} The court relied on precedent in applying the rules of construction to the statutes in question.\textsuperscript{82}

The Oklahoma Court of Civil Appeals resolved the conflict by determining that "the [Oklahoma] Legislature must have intended that only 'unclassified employees' be subject to forfeiture of position and benefits upon conviction of a felony."\textsuperscript{83} However, the Oklahoma Supreme Court did not agree and stated that section 24.1 applied in this instance because the statute provided that "any . . . officer or employee' convicted of a felony is subject to forfeiture.\textsuperscript{84} In explanation the Oklahoma Supreme Court cited Shattuck v. Grider\textsuperscript{85} for the judicial definition of the word "any" to mean "every" and "all.\textsuperscript{86} The Ferrell court went on to state that the Oklahoma Court of Civil Appeals' finding did not "further the mandated goal of harmonizing two [statutory] provisions without violence to either."\textsuperscript{87}

The Ferrell court further reasoned that "the [Oklahoma] Legislature's decision that a convicted felon forfeits [his] public position and benefits in no way conflicts with

\textsuperscript{77} See id. at 578-79.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 579.
\textsuperscript{80} See id. at 577.
\textsuperscript{81} Id. (quoting Sharp v. Tulsa County Election Bd., 890 P.2d 836, 840 (Okla. 1994)).
\textsuperscript{82} See Forston v. Heisler, 341 P.2d 252, 253 (Okla. 1959). The *Forston* court held that in construing statutes, harmony, not confusion, is to be sought and when two acts or parts thereof are reasonably susceptible of a construction that will give effect to both and the words of each, without violence to either, it should be adopted in preference to one which, though reasonable, leads to the conclusion that there is a conflict.
\textsuperscript{83} *Ferrell*, 959 P.2d at 578.
\textsuperscript{84} Id.
\textsuperscript{86} Id. at 830.
\textsuperscript{87} *Ferrell*, 959 P.2d at 578.
its decision that classified employees may be discharged only for just cause." The court stated that section 24.1's forfeiture provision merely augments the discipline and discharge procedures for permanent classified employees found at section 840-6.5. Therefore, section 840-6.5 does not take precedence over section 24.1.

2. Dissenting Opinion

In a 6-2 decision, the dissent read section 24.1 not as applying to "any" state employee but only applying to elected or appointed state officers or to any employee of such officers. In relying on this argument, the dissent used the remaining language in section 24.1 to support the interpretation that the statute's intent applies only to the employees of elected or appointed officers.

The dissent reasoned that section 24.1 deals specifically with the various procedures and regulations of state officers. The section addresses the forfeiture of retirement benefits by "such officer or employee." In addition to its forfeiture language, section 24.1 also sets out procedures for filling a forfeited office. Therefore, section 24.1 applies exclusively to elected or appointed officers and their employees. The dissent further stated that with title 51 as a guide, title 74, section 840-6.5 applies only to "classified employees" and does not provide for forfeiture of back pay for such employees.

IV. Analysis of the Ferrell Decision

The Ferrell decision suggests that Oklahoma courts do not consider the protections afforded to employees under the Merit Protection statutes as absolute. Section 840-6.5, which deals specifically with permanent classified state employees, provides specific guidelines for discharge and suspension of such employees. Yet, according to Ferrell, section 24.1 supersedes these guidelines. The provisions of section 24.1 outline discharge procedures for elected or appointed officers or employees convicted of a felony.

A. Intent of Title 51, Section 24.1 of Oklahoma Statutes

The key issue in Ferrell appeared to be whether the Oklahoma legislature intended section 24.1 to apply to all state employees, regardless of classification, or only to elected or appointed officers and their appointed employees. The original legislative intent of section 24.1 is unrecorded. The Oklahoma House of Representatives retained no records or notes of the 1965 proceedings. If the original legislative intent

88. Id. at 579.
89. See id.
90. See id. at 580.
91. See id.
92. Id.
93. See id.
94. See id.
95. See id.
of a statute is unknown, then the court must turn to statutory construction.\textsuperscript{98} In statutory construction, a court must consider the language of the Legislative Act as a whole to preserve the remedial purposes of the statute and to avoid incongruous results.\textsuperscript{99} Oklahoma courts have also stated that the law abhors a forfeiture statute so that courts must strictly construe statutes authorizing such forfeiture.\textsuperscript{100}

An Oklahoma Attorney General Opinion supports the argument that section 24.1 applies only to officers and their employees.\textsuperscript{101} The opinion reads in part: "The Governor specifically asked the legislature to amend 51 Okla. Stat. section 24.1 so that it would include county officers and employees to those individuals automatically suspended upon a felony conviction."\textsuperscript{102} While this passage is suggestive of the overall intent of only the 1981 amendment, it is possible to infer that the Oklahoma legislature meant to include only elected and appointed officers and their employees in the original 1965 statute.

Arguably, section 24.1 applies only to elected or appointed officers and their employees who serve for a specific term of office. In contrast to employees selected for permanent employment, elected or appointed officers or employees serve only for a designated period. Title 51 of the Oklahoma statutes deals directly with officers of the state. Looking to the language of the statute, a court could infer that section 24.1 applies only to state officers or employees who are serving for a specific term of office. Section 24.1 reads: "[a]ny elected or appointed state or county officer or employee who, during the term for which he was elected or appointed, is, or has been, found guilty . . . shall be automatically suspended from said office or employment."\textsuperscript{103} At first glance neither permanent employees nor employees on indefinite status appear to fall under this statute. Nonetheless, the Ferrell court specifically ruled that section 24.1 applies to all state employees, regardless of classification.\textsuperscript{104}

B. Discussion of Back Pay

The Supreme Court of Oklahoma failed to address the real issue of the case, the employee's claim for back pay, wages, and benefits. Section 24.1 reads specifically that upon conviction or guilty plea to a felony, suspension without pay is automatic.\textsuperscript{105} In Ferrell, the trial court did not convict the employee until October 1991. Yet, the claim for back pay, wages, and benefits was for the period of December 1988 to February 1992, the period of suspension between the two discharges. In effect, the Oklahoma Supreme Court's decision denied back pay,

\textsuperscript{100} See Ferkey v. State, 327 P.2d 463 (Okla. 1958).
\textsuperscript{102} Id. (emphasis added).
\textsuperscript{103} 51 OKLA. STAT. § 24.1 (Supp. 1999) (emphasis added).
\textsuperscript{104} See State v. Ferrell, 959 P.2d 576 (Okla. 1998).
\textsuperscript{105} See 51 OKLA. STAT. § 24.1.
wages, and benefits for the period of the suspension, which occurred before the actual felony conviction.

In addition to section 24.1, the Oklahoma Constitution also provides for suspension of elected officials upon conviction of a felony. The Oklahoma Constitution further stipulates that if an appellate court reverses a conviction, the elected official is entitled to accumulated pay and allowances held due to the suspension. In Ferrell, the Military Department did not suspend the employee but discharged him for allegations of a felony. The administrative law judge found this discharge improper and ordered reinstatement with a thirty-day suspension. Although the judge held the discharge improper, the Military Department did not pay the employee back wages for the time of discharge.

Section 24.1 provides only that a suspension shall continue until the appropriate court reverses the conviction or plea. It does not state what actions an agency must take when it cancels such a suspension. The statute does not address back pay, wages, or benefits. Nevertheless, it seems questionable whether section 24.1 applies in this instance when the application for back pay and wages was for an employment suspension that occurred before the felony conviction.

For example, the federal government provides specific remedies for unwarranted discharge or suspension of federal employees. Title 5 U.S.C. § 5596 stipulates that if an unwarranted or unjustified personnel action affects an employee, the employee is entitled to back pay and wages during the period of suspension or discharge.

The State of Oklahoma has no such back pay statute. The Code of Federal Regulations defines an unjustified or unwarranted personnel action as an act that an appropriate authority determines is unjustified or unwarranted under applicable law.

106. See Okla. Const. art. VIII, § 1 (1966 amendment); see also Manning v. State, 123 P. 1029, 1030 (Okla. Crim. App. 1912) (stating that the suspension provision in the Oklahoma Constitution is founded upon the strong public interest that public affairs not be administered by those who have been convicted of a serious offense).


108. See Ferrell, 959 P.2d at 577.

109. See id.


111. The statute reads as follows:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee —

is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect —

an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period.


112. The regulation reads:
In *Jankowitz v. United States*\(^{113}\) the United States Court of Claims directly addressed the issue of back pay for the unwarranted suspension of a federal employee. The *Jankowitz* court held that if an agency follows the applicable procedural recommendations and safeguards in suspending the employee, a court could not hold the decision unwarranted or unjustified.\(^{114}\) In *Jankowitz*, a grand jury indicted an employee of the Federal Housing Administration (FHA) for bribery.\(^ {115}\) The FHA subsequently suspended the employee because of the indictment.\(^ {116}\) A jury trial later acquitted the employee of all charges and the FHA restored the employee to duty.\(^ {117}\) The agency denied the employee's application for back pay for the period of his suspension until the time of his acquittal.\(^ {118}\) The court reasoned that since the agency followed all applicable procedural rules and safeguards, a court could not later hold the suspension unwarranted or unjustified.\(^ {119}\)

Five years after deciding *Jankowitz*, the United States Court of Claims clarified its ruling in *Summers v. United States*.\(^ {120}\) The court stated that its holding in *Jankowitz* did not intend for suspension to be reversible if the employing federal agency gave back pay during the suspension period.\(^ {121}\) The court further stated that "[a]gencies have a certain amount of discretion to determine that an employee has undergone an unjustified or unwarranted personnel action."\(^ {122}\)

In *Ferrell*, the employee did not dispute the procedure followed in the termination process. However, in a post-termination appeal, an administrative law judge held the discharge improper.\(^ {123}\) When an appropriate court finds the discharge improper (i.e., unjustified), the court should also question the legitimacy of the agency disallowing the employee's back pay. A post-termination appeal, like the one in the *Ferrell* case, could take months or even years to complete. A wrongful discharge leaves an employee without income and also without recourse concerning the back pay if he

\(\fn_cm{\text{NOTES}}\)

"Unjustified or unwarranted personnel action" means an act of commission or an act of omission . . . that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).


113. 533 F.2d 538 (Ctr. Cl. 1976).
114. See id. at 543.
115. See id. at 540.
116. See id.
117. See id. at 540-41.
118. See id. at 541.
119. See id.; see also Brown v. Department of Justice, 715 F.2d 662, 669 (D.C. Cir. 1983) (declining to follow the reasoning used by the Court of Claims in *Jankowitz*, the Court of Appeals for the District of Columbia held that initial suspension based upon an indictment is proper but went on to state that, following an acquittal, back pay must be paid to the date the suspension was imposed).
120. 648 F.2d 1324 (Ctr. Cl. 1981).
121. See id. at 1329.
122. Id. at 1330.
is later reinstated. Not only is this process unfair but also the innocent employee suffers the consequences.

The United States Court of Appeals for the Federal Circuit addressed this same issue in Richardson v. United States Customs Service.\textsuperscript{124} The Richardson court held that it is a federal agency's discretionary decision to determine whether an employee's reinstatement with pay is effective on the date of reinstatement or on the earlier date of suspension.\textsuperscript{125}

In Richardson, a grand jury indicted two Customs Service employees for assaulting a federal officer.\textsuperscript{126} Consequently, the Customs Service suspended both employees for an indefinite period without pay.\textsuperscript{127} A trial court subsequently acquitted both employees.\textsuperscript{128} The Customs Service then reinstated the employees with pay, effective on the date of their acquittal.\textsuperscript{129} The Service denied the employees' claims for back pay, overtime, and benefits that would have accrued during the time of the suspension.\textsuperscript{130}

The Richardson court reasoned that the Customs Service initially had reasonable grounds to suspend the employees.\textsuperscript{131} The court stated that an agency is neither required nor precluded from making the reinstatement with back pay retroactive to the date of suspension.\textsuperscript{132} "That decision is a matter for the agency, in the first instance, to make, based on all the facts and circumstances."\textsuperscript{133} The court further stated, however, that in suspending an employee the agency may not act in an arbitrary, capricious, or abusive manner.\textsuperscript{134}

Comparing Richardson to Ferrell, one could argue that although the Military Department believed it had reasonable grounds to discharge the employee, it abused its discretion in denying back pay upon reinstatement. Despite the alleged misuse of state funds by the employee, an administrative law judge found the discharge improper and ordered reinstatement with only a thirty-day suspension. The Military Department complied by reinstating the employee but denied back pay between the thirty-day suspension period and the employee's reinstatement. The employee appealed the decision, but before the court could decide the issue, a trial court convicted the employee of thirty-six felony counts.\textsuperscript{135}

In a similar case, a Supreme Court of New York Appellate Division ruled that an employee is entitled to back pay and benefits even if the employee pleads guilty to a felony. In Coping v. New York Transit Authority,\textsuperscript{136} the court held that a public

\textsuperscript{124} 47 F.3d 415 (Fed. Cir. 1995).
\textsuperscript{125} See id. at 421.
\textsuperscript{126} See id. at 417.
\textsuperscript{127} See id.
\textsuperscript{128} See id.
\textsuperscript{129} See id.
\textsuperscript{130} See id.
\textsuperscript{131} See id. at 421.
\textsuperscript{132} See id.
\textsuperscript{133} Id.
\textsuperscript{134} See id. at 422.
\textsuperscript{135} See State v. Ferrell, 959 P.2d 576, 577 (Okla. 1998).
employee was entitled to his full wages and benefits from the date thirty days after his suspension for an indictment of murder until the date when he pled guilty to manslaughter.137 The court reasoned that since the applicable New York statute provided for a maximum thirty-day suspension, an employee suspended for a longer period is entitled to pay and benefits.138 "To accede to the request of the appellant [indefinite suspension without pay] would be tantamount to giving the government the power to starve the employee while it dallied in the prosecution of charges. In our view, that is exactly the mischief that the 30-day limitation of the statute sought to avoid."139

Justice Thurgood Marshall made the same argument in his concurring opinion in Cleveland Board of Education v. Loudermill.140 Justice Marshall stated that the Court should place a greater emphasis on the accuracy of the pretermination proceeding. "After wage termination, the employee often must wait months before his case is finally resolved, during which time he is without wages from his public employment."141 Justice Marshall continued by noting that the Court accepts an impermissibly high risk that a wrongfully discharged employee will often be subject to a lengthy wait for vindication.142

In fact, the employee in Ferrell realized this high risk, and the process subjected him to such a lengthy wait. The post-termination appeal took almost two years to complete.143 During this time, the wrongful discharge left the employee with no income. Further, once it reinstated the employee, the Military Department did not provide him with back pay.144 The employee in Ferrell experienced the precise problem outlined by the Supreme Court of New York Appellate Division and Justice Marshall.

C. Possible Impact of the Ferrell Case

Is a classified Oklahoma public employee entitled to back pay, wages, and benefits upon reinstatement for a wrongful discharge or suspension? Arguably, the Merit Protection Commission addressed this question when it limited suspension of a classified employee to a maximum sixty days.145 Thus, a classified employee could lose back pay, wages, and benefits, but for no more than sixty days. However, the Ferrell decision suggests that a classified employee is not entitled to back pay. Certainly, under section 24.1, a convicted felon is not granted back pay. But in Ferrell, both the discharge and the reinstatement took place prior to the felony conviction. The decision implies that section 24.1 controls even previous claims to back pay that occurred before a felony conviction.

137. See id. at 621.
138. See id. at 622.
139. Id. at 622.
141. Id. at 549.
142. See id.
144. See id.
145. See 74 OKLA. STAT. § 840-1.3 (Supp. 1999).
Oklahoma has no statutory provisions addressing the rights of employees upon wrongful discharge or suspension. However, the Oklahoma Constitution provides that an elected official who has a felony conviction reversed is entitled to accumulated back pay from the time of suspension. Therefore, the Oklahoma Constitution protects elected officials, but other state employees have no recourse if they are later vindicated of a wrongful suspension or discharge. This policy is neither fair nor in the best interests of the public. An employee wrongfully accused may suffer loss of job, pay, and benefits even if the agency never proves the charges. A state agency might reinstate the employee if the discharge is improper, but there is no avenue available for the recovery of back pay. This process subjects employees, especially those supporting families, to severe hardship.

Some employees deserve the discharge or suspension they receive. However, the hardship forced upon innocent employees may outweigh the policy of suspension or discharge without pay. Suspending an employee with pay alleviates such a hardship. It also forces the agency to an expedient exercise of justice.

In the Ferrell case, once the employee had the opportunity to test the strength of the evidence against him by confronting and cross-examining adverse witnesses and presenting witnesses on his own behalf, the administrative law judge ruled in the employee's favor. Nevertheless, this opportunity did not take place until almost two years after the initial discharge. The agency denied the employee wages and benefits during that time. Even when the judge ordered a reinstatement, the agency refused to award the back pay. Therefore, Oklahoma falls into the category of jurisdictions that permits state agencies to use their discretion in deciding on the award of back pay for wrongful termination. A state employee in Oklahoma has no absolute right to back pay, wages, or benefits.

V. Conclusion

In Ferrell, the Supreme Court of Oklahoma decided that title 51, section 24.1 of the Oklahoma Statutes applies to all state employees, regardless of their classification. The Oklahoma statutes now afford no special treatment to employees in the Merit Protection System if convicted of a felony. Indeed, the protections for the Merit System employees are now neither complete nor unassailable, as demonstrated by Ferrell.

However, the broader implications of this case may be difficult to judge. Arguably, the Supreme Court of Oklahoma has decided to let state agencies use their own discretion in awarding back pay for wrongful termination. However, this interpretation might be questionable, considering the court failed to address this issue. Nevertheless, absent any statutory or case law on the subject, the court's decision demonstrated no concern about the prospect of the Military Department denying an employee back wages.

Conversely, a strict reading of the case could be interpreted as only deciding the conflict between title 74, section 840-6.5 and title 51, section 24.1 of the Oklahoma Statutes. If this is a correct interpretation, then Ferrell affects only those employees that fall under the Merit Protection System. In either case, back pay for an employee convicted of a felony that is later reversed seems to be at the sole discretion of the employing agency. While this may seem unfair to the wronged employee or good management to the employing agency, it is evident this is Oklahoma law.

Tom Ivester