

# Constitutional Law--Fifth Amendment--Dismissal of Public Employees for Insubordination in Refusing to Answer Questions of Investigative Committee on Fifth Amendment Grounds Held Lawful (Nelson v. County of Los Angeles, 362 U.S. 1 (1960))

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the reaction to a case in which the Court cannot use a murdered body<sup>47</sup> as evidence because a "constable has blundered"?<sup>48</sup>



CONSTITUTIONAL LAW—FIFTH AMENDMENT—DISMISSAL OF PUBLIC EMPLOYEES FOR INSUBORDINATION IN REFUSING TO ANSWER QUESTIONS OF INVESTIGATIVE COMMITTEE ON FIFTH AMENDMENT GROUNDS HELD LAWFUL.—A California statute<sup>1</sup> provided that it was the duty of any state employee subpoenaed before a state or federal committee to answer any questions concerning membership in certain organizations. Petitioners, subpoenaed before a congressional investigative committee, were further ordered by their employer, the County of Los Angeles, to answer any questions which might be asked of them. Upon their refusal to do so on fifth amendment grounds, they were discharged. The United States Supreme Court, affirming the California Supreme Court, *held* that the dismissal was lawful because the Court concluded that petitioners were dismissed for insubordination in refusing to answer proper questions and not because they invoked their constitutional privilege. *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960).

"This," as Mr. Justice Brennan sadly remarked, "is another in the series of cases involving discharges of state and local employees from their positions after they claim their constitutional privilege against self-incrimination before investigating committees."<sup>2</sup> The area has been marked by a series of close decisions and bitter dissents. In *Garner v. Board of Pub. Works*,<sup>3</sup> city employees were discharged for their refusal to execute a loyalty affidavit. A declaratory judgment in *Adler v. Board of Educ.*<sup>4</sup> upheld a statute which provided for the dismissal of state employees knowingly belonging to subversive organizations as unfit. These earlier cases established the validity of dismissals based on insubordination or subversive activities casting doubt on the employee's fitness.<sup>5</sup> They rested on the doctrine that

<sup>47</sup> See Grant, *Circumventing the Fourth Amendment*, 14 So. CAL. L. REV. 359, 364-65 (1941).

<sup>48</sup> *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

<sup>1</sup> CAL. GOV'T CODE § 1028.1 (Deering 1958).

<sup>2</sup> *Nelson v. County of Los Angeles*, 362 U.S. 1, 10 (1960) (dissenting opinion).

<sup>3</sup> 341 U.S. 716 (1951) (Frankfurter and Burton, JJ., dissenting in part in separate opinions; Black and Douglas, JJ., dissenting in separate opinions).

<sup>4</sup> 342 U.S. 485 (1952) (Frankfurter, Black, and Douglas, JJ., dissenting in separate opinions).

<sup>5</sup> *Adler v. Board of Educ.*, 342 U.S. 485 (1952); *Garner v. Board of Pub. Works*, 341 U.S. 716 (1951).

the state has a legitimate interest not only in questioning its employees as to matters that prove relevant to their fitness and suitability for public service,<sup>6</sup> but also in the protection of the integrity and competency of the public service itself.<sup>7</sup> But in attempting to preserve a constitutional balance between the preservation of state security and the protection of individual constitutional rights, the Court remained cautious. In *Wiemann v. Updegraff*,<sup>8</sup> another loyalty oath case in which membership alone was made a disqualifying factor in excluding an employee from employment, a unanimous Court, impressed by the fact that present or past membership may be innocent, distinguished *Garner* and *Adler* by making proved *scienter* a necessary element of any dismissal on these grounds.<sup>9</sup>

Perhaps the Court was overcautious in the famous case of *Slochower v. Board of Educ.* which arose next.<sup>10</sup> In that case, a teacher was dismissed when he refused on fifth amendment grounds<sup>11</sup> to answer questions before a federal committee. The Court, adopting the spirit of the dissents in *Garner* and *Adler*, refused to uphold the dismissal, reasoning that the invocation of the fifth amendment had been made the predominant reason for the discharge.<sup>12</sup> The majority further felt that there was no relation between Slochower's employment and the scope of the committee investigation, and that there was a basic difference between state or local investigations directly concerning the employee's fitness and national federal investigations concerning government security.<sup>13</sup> Besides the basic constitutional test of the grounds for dismissal, therefore, the *Slochower* Court established, in addition, the relation of employment to inquiry and the difference between the scope of state and federal investigations as material considerations in this area. In *Beilan v. Board of Educ.*,<sup>14</sup> the next case, a teacher, refusing to answer questions as to his membership in subversive organizations asked by his immediate superintendent and going directly to his fitness as a teacher, was dismissed on the grounds of *incompetency*.<sup>15</sup> And in *Lerner v. Casey*,<sup>16</sup>

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<sup>6</sup> See *Adler v. Board of Educ.*, *supra* note 5, at 492; *Garner v. Board of Pub. Works*, *supra* note 5, at 720.

<sup>7</sup> See *Adler v. Board of Educ.*, *supra* note 5, at 493; *Garner v. Board of Pub. Works*, *supra* note 5, at 721.

<sup>8</sup> 344 U.S. 183 (1952).

<sup>9</sup> *Id.* at 188-89.

<sup>10</sup> *Slochower v. Board of Educ.*, 350 U.S. 551 (1956) (Reed, Burton, Minton and Harlan, J.J., dissenting).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.* at 558. See also *Nelson v. County of Los Angeles*, 362 U.S. 1, 7 (1960); *id.* at 10 (dissenting opinion).

<sup>13</sup> *Slochower v. Board of Educ.*, *supra* note 10, at 558.

<sup>14</sup> 357 U.S. 399 (1958) (Warren, Douglas, Black, and Brennan, JJ., dissenting).

<sup>15</sup> *Id.* at 400, 406-07.

<sup>16</sup> 357 U.S. 468 (1958) (Warren, Douglas, Black, and Brennan, JJ., dissenting).

a subway conductor, refusing to answer similar questions by a state superintendent, was dismissed on the grounds of his *doubtful trust and reliability*.<sup>17</sup> The Court in both cases, utilizing the *Slochower* approach, reasoned that the grounds for dismissal were constitutional, that there was a valid relation between the employment and the inquiry, and that both cases concerned the scope of inquiry of a state rather than a federal body.<sup>18</sup> The minority in the *Beilan* and *Lerner* cases, adhering more closely to the *Slochower* majority, continued to suspect that invocation of the fifth amendment was being used as the basic grounds for dismissal, and that *incompetency* and *doubtful trust* were an evasive disguise of that fact.<sup>19</sup> The same minority, foreseeing a weakening of the *Slochower* holding, further contended in both cases that there was no valid relation between employment and inquiry, and that the real reason for dismissal had been the invocation of the fifth amendment.<sup>20</sup> This basic suspicion is also evident in the instant *Nelson* case.<sup>21</sup>

The first difficulty presented to the Court in all these cases involving employee dismissals has been in determining the precise grounds for discharge. The reason for dismissal is the legal fulcrum on which each case ultimately turns. The *Slochower* case intimated that where invocation of the fifth amendment privilege is made the sole grounds for dismissal, the dismissal will not be upheld.<sup>22</sup> But the point then underlying each case is whether or not the invocation, in fact, has been made the sole grounds for dismissal. Since *Slochower*, it appears that no cases have bottomed the discharge on the invocation alone. Several other dismissal devices have been employed with varying degrees of success. Each case since *Slochower* contains both a *refusal to answer* and an *invocation* of fifth amendment privileges, and it is imperative to note that the constitutionally valid devices for dismissal rest on the *refusal*. The employee's refusal, for instance, may be equated with a breach of duty. *Breach of duty* thereby becomes the fulcrum for dismissal, and this device has been upheld.<sup>23</sup> Similarly, a refusal to answer—nothing more—has been

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<sup>17</sup> *Id.* at 472, 475.

<sup>18</sup> See *Beilan v. Board of Educ.*, 357 U.S. 399, 401, 405, 406-07 (1958); *Lerner v. Casey*, 357 U.S. 468, 471-72, 474-77 (1958).

<sup>19</sup> See *Beilan v. Board of Educ.*, *supra* note 18, at 411, 416, 424 (dissenting opinions).

<sup>20</sup> *Id.* at 415, 422, 424 (dissenting opinions).

<sup>21</sup> *Nelson v. County of Los Angeles*, 362 U.S. 1, 9, 13, 14-15 (1960) (dissenting opinion).

<sup>22</sup> *Slochower v. Board of Educ.*, 350 U.S. 551, 558 (1956).

<sup>23</sup> See, *e.g.*, *Nelson v. County of Los Angeles*, 362 U.S. 1, 2-3 (1960) (breach of statutorily imposed duty); *Beilan v. Board of Educ.*, 357 U.S. 399, 405 (1958) (obligation inherent in job); *Matter of Cohen*, 7 N.Y.2d 488, 166 N.E.2d 672, 199 N.Y.S.2d 658 (1960) (breach of professional duty and duty of lawyer to court).

equated with insubordination,<sup>24</sup> lack of candor,<sup>25</sup> or incompetency on the part of the employee,<sup>26</sup> all of which are fairly close in meaning and ultimate effect. Dismissals based on these devices have withstood the constitutional test,<sup>27</sup> but the courts have gone out of their way to make it clear that it is the *refusal to answer per se* that is ultimately made the basis for discharge rather than invocation of the fifth amendment.<sup>28</sup>

The validity of these "dismissal devices" based on mere refusal has been subject to constant challenge by a minority who contend that each device is merely a convenient way for circumventing constitutional safeguards and circumnavigating the *Slochower* case.<sup>29</sup> The gist of minority thought is that whatever "thin patina" we utilize, we are in practical effect, if not in actual intent, dismissing the employee for invoking the fifth amendment, and this amounts to nothing more than an unconstitutional procedural short-cut.<sup>30</sup>

In the case at hand, nevertheless, the Court, upholding the power of the state to predicate discharge on a refusal to give information concerning security as established in the *Garner* and *Adler* cases, concluded that the dismissal was based on insubordination in refusing to answer, and not because of the reliance on the fifth amendment.<sup>31</sup> In the opinion of the majority, the reason for refusing to answer was immaterial.<sup>32</sup> In this regard, therefore, the Court has followed the trend of the *Lerner* and *Beilan* cases, while continuing to pay lip service to the *Slochower* case.

Another issue of major importance in cases involving investigative committees is whether the subject matter of the inquiry and the questions themselves should be relevant to the employee's fitness or position, if he is to be dismissed for refusing to answer them. It is significant that this issue was usually considered an important one in all of the earlier cases.<sup>33</sup> The majority, in these cases, recognizing

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<sup>24</sup> See, *e.g.*, *Nelson v. County of Los Angeles*, *supra* note 23, at 3.

<sup>25</sup> See, *e.g.*, *Nelson v. County of Los Angeles*, *supra* note 23, at 13 (dissenting opinion); *Beilan v. Board of Educ.*, *supra* note 23, at 405; *id.* at 421 (dissenting opinion); *Lerner v. Casey*, 357 U.S. 468, 476 (1958).

<sup>26</sup> See *Beilan v. Board of Educ.*, 357 U.S. 399, 406-07 (1958).

<sup>27</sup> See, *e.g.*, *Nelson v. County of Los Angeles*, *supra* note 23; *Beilan v. Board of Educ.*, *supra* note 26; *Lerner v. Casey*, *supra* note 25.

<sup>28</sup> See *Nelson v. County of Los Angeles*, 362 U.S. 1, 6-7 (1960); *Beilan v. Board of Educ.*, *supra* note 26, at 405-06; *Lerner v. Casey*, *supra* note 25, at 475-76.

<sup>29</sup> See, *e.g.*, *Nelson v. County of Los Angeles*, *supra* note 28, at 14-15 (dissenting opinion); *Beilan v. Board of Educ.*, *supra* note 26, at 415-16, 423-24 (dissenting opinions).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Nelson v. County of Los Angeles*, *supra* note 28, at 6, 7-8.

<sup>32</sup> *Ibid.*

<sup>33</sup> See, *e.g.*, *Beilan v. Board of Educ.*, 357 U.S. 399, 401; *id.* at 415 (1958) (dissenting opinion); *Lerner v. Casey*, 357 U.S. 468, 474 (1958); *Slochower v. Board of Educ.*, 350 U.S. 551, 558 (1956); *Adler v. Board of Educ.*, 342

the relevancy of the issue, had adopted the policy that security is a valid subject of inquiry between an investigative body and any employee even remotely associated with that security.<sup>34</sup> But this holding had never been extended by the Supreme Court to include federal investigative bodies.<sup>35</sup> In fact, the holding in the *Slochower* case was directly opposite. The minority (*Slochower*) view was that the connection between inquiry and the sanction of dismissal for refusal to answer should be properly limited to local investigations directly concerning the employee's fitness, not nationwide investigations founded on "national security."<sup>36</sup> The *Nelson* case disposes of the federal-state distinction as "not determinative" of the issue and thus lessens the import of the relation of employment to inquiry.<sup>37</sup> As an extension of the *Beilan* and *Lerner* cases to the area of national investigations, this is a further severe limitation, if not an actual overruling, of the *Slochower* case.

The *Nelson* case, therefore, arising at a critical period in the changing policy of the Court, occupies a position of much significance in clarifying the law and establishing a firm vantage point for future decisions. Whereas earlier decisions turned on the constitutional validity of the grounds for discharge, the relation of employment to inquiry, and the difference between the scope of federal or state investigative bodies,<sup>38</sup> the *Nelson* case has lessened the import of the relation of employment to inquiry and has deemed unimportant the difference between the scope of federal or state investigative bodies. It thereby establishes as the basic controlling test an investigation of the dismissal device itself.<sup>39</sup> In so doing, it has extended the principles of *Beilan* and *Lerner* to the area of federal investigations. In upholding the validity of the California statute and making clear the

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U.S. 485, 492-93 (1952); *Garner v. Board of Pub. Works*, 341 U.S. 716, 720-21 (1951). See also *Daniman v. Board of Educ.*, 306 N.Y. 532, 540-41, 119 N.E.2d 373, 379 (1954), *rev'd sub nom. Slochower v. Board of Educ.*, *supra*.

<sup>34</sup> See, e.g., *Lerner v. Casey*, *supra* note 33, at 474; *Adler v. Board of Educ.*, *supra* note 33, at 492-93; *Garner v. Board of Pub. Works*, *supra* note 33, at 720-21.

<sup>35</sup> The investigative bodies in every case preceding *Nelson* (except *Slochower*) were all either state or local organs. In the *Beilan* case, the teacher was first questioned by his immediate superintendent and later by a federal committee, the grounds for dismissal turning on the refusal before the superintendent. See *Beilan v. Board of Educ.*, *supra* note 33, at 401-03. The New York Court of Appeals had held in *Daniman v. Board of Educ.*, 306 N.Y. 532, 541, 119 N.E.2d 373, 379 (1954), that the state statute applied equally to a federal legislative committee, thus foreshadowing the *Nelson* case, but this holding was reversed by the Supreme Court in the *Slochower* case.

<sup>36</sup> *Slochower v. Board of Educ.*, 350 U.S. 551, 558 (1956).

<sup>37</sup> *Nelson v. County of Los Angeles*, *supra* note 28, at 7-8.

<sup>38</sup> See, e.g., cases cited *supra* note 33.

<sup>39</sup> *Nelson v. County of Los Angeles*, 362 U.S. 1, 6-7 (1960).

precise grounds for dismissal, the Court here has clarified several doubts that were cast by the *Slochower* case. It is evident also that the *Nelson* case will play a significant role in determining future cases in the area.<sup>40</sup> It is also significant that state courts, adhering to the *Slochower* doctrine, have already begun to distinguish the *Nelson* case on various grounds.<sup>41</sup>

It is often difficult to decide whether a statute is designed purposely to circumvent the constitutional privilege, to provide a procedural short cut for the dismissal of employees, to include a built-in inference of guilt or provide an actual punishment for taking the fifth amendment privilege. But in this area of 5-4 decisions and constantly shifting policies, the *Nelson* approach—an exact and deliberate investigation of the ultimate nature, intent, operation and practical effect of the relevant device of each case—is one answer to a difficult problem.



CONTRACTS—ILLEGALITY—ILLEGALITY OF PERFORMANCE HELD GOOD DEFENSE IN ACTION TO RECOVER ON A VALID CONTRACT.—Plaintiff was authorized by defendant corporation to secure distribution rights for motion pictures which he subsequently procured by bribing a producer's agent. Upon nonpayment of his commission, plaintiff brought an action for an accounting. The Court of Appeals, reversing a judgment of the Appellate Division, held that "consistent with public morality and settled public policy"<sup>1</sup> a party

<sup>40</sup> See, e.g., *Matter of Cohen*, 7 N.Y.2d 488, 166 N.E.2d 672, 199 N.Y.S.2d 658, cert. granted, 363 U.S. 810 (1960), in which a New York attorney availed himself of the constitutional privilege when questioned by a judicial inquiry concerning unethical legal practices in his own county. The New York court upheld his disbarment as validly based on the breach of professional duty and the duty to the court, rather than on the invocation itself. Since the investigating body was not federal and the scope of inquiry was obviously intimately associated with the plaintiff's fitness for practice, the case would appear to be within the holding of the *Nelson* case.

<sup>41</sup> See, e.g., *Board of Educ. v. Intille*, — Pa. —, 163 A.2d 420 (1960), where school teachers were dismissed for incompetency on the basis of their refusal to answer questions before a congressional committee. In reversing the lower court and refusing to sustain the dismissal, the Pennsylvania Supreme Court held that the teachers were dismissed for invoking the fifth amendment, and incompetency had not been proved within the public school code. The case seems to follow an entire approach left open by *Vitarelli v. Seaton*, 359 U.S. 535 (1959), namely, that the dismissal must conform to the requirements of the administrative code of the employer or else it will be immediately overturned.

<sup>1</sup> *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 471, 166 N.E.2d 494, 497, 199 N.Y.S.2d 483, 487 (1960).