

[Court Issues Ruling Restricting Ability to Suspend Police Officers Pending Investigation](#)

by [Adam Santucci](#)

April 26, 2011

In a recent precedent-setting opinion, the Third Circuit Court of Appeals significantly restricted the ability of police departments to suspend police officers pending investigation in Pennsylvania. The decision in [*Schmidt v. Creedon*, F.3d \(3rd Cir. 2011\) \(pdf\)](#) makes clear that absent extraordinary circumstances, prior to suspending a police officer for any reason, a police department must provide the officer with notice and a hearing.

In *Schmidt*, the plaintiff, a police officer, was suspended and ultimately terminated after he entered criminal charges against his superior officers into a criminal record data base. According to the employer, following a dispute, the officer left his duty area, entered information that there was probable cause to arrest some of his superiors officers, and failed to report these allegations through his chain of command. After the department conducted a brief investigation into the incident, the plaintiff was suspended pending further investigation. The officer was suspended three days after the incident occurred, and was not questioned or interviewed before he was suspended. The officer was eventually terminated, but reinstated by an arbitrator with no back pay.

The plaintiff filed suit against the department and some of his superior officers, alleging that they violated the 14th Amendment of the United States Constitution by suspending him without providing him with notice of the charges against him or a hearing. Under the 14th Amendment, a government actor cannot deprive an individual of life, liberty or property without due process. In the employment context, the courts have held that if another statute, such as a civil service statute, provides employees with protection from suspension or termination, then such employees have a property interest that cannot be taken away without due process. Interestingly, the court relied on a provision in the Borough Code to find that the plaintiff had a property interest in his job because the Borough Code provides that police officers may not be suspended or terminated without just cause.

The court concluded that the plaintiff was deprived of his rights under the 14th Amendment because he was not afforded due process before he was suspended pending investigation. The court held that, except for extraordinary circumstances, under Pennsylvania law, notice of the charges and a brief and informal pre-suspension hearing is necessary, even if the officer has access to a collectively bargained grievance procedure or other appeal process.

Only a brief and informal hearing is necessary in this context, and it appears that departments can satisfy these requirements by stating, verbally or in writing, the nature of the investigation, the nature of evidence currently available, and by allowing the officer to provide a statement. In addition to interviewing the officer before suspending him or her pending investigation, which has always been a good practice, departments should be sure to issue a written suspension notification.

The court made clear that there is an exception to the pre-suspension hearing requirement for "extraordinary circumstances," and further defined that term to include those situations in which some valid government interest is at stake that justifies postponing the hearing until after the suspension. However, the court did not determine whether such circumstances existed in this case, and provided no further explanation or guidance as to what may constitute extraordinary circumstances. Importantly, waiting a few days to suspend an officer while additional information is gathered may undermine a claim that an important interest existed that required immediate suspension without a hearing. The court also noted that the United States Supreme Court has held, in *Gilbert v. Homar*, 520 U.S. 924 (1997), that if a third party has determined probable cause existed to believe that a serious crime occurred, such as when an officer has been arrested and charged with a crime, a department may suspend an officer without a hearing.

The court appeared to go to great lengths to limit its decision in this case, and to provide departments with as much guidance as possible. For example, the court noted that if an officer is suspended with pay, the analysis would have very likely been different. However, while the court's decision appears to be limited to police officers, the due process requirements would apply to any public employee who is protected by statute from being suspended or terminated without good cause, unless the statute provides an exception or one of the exceptions noted above applies. Therefore, in addition to police departments, all public sector employers in Pennsylvania should be sure to review their suspension procedures to ensure compliance with this decision.

This decision will require some police departments to change their practices regarding suspensions pending investigation, and may hamper a department's ability to take immediate action in certain cases.

© 2010 McNees Wallace & Nurick LLC

This document is presented with the understanding that the publisher does not render specific legal, accounting or other professional service to the reader. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. Anyone using this material must always research original sources of authority and update this information to ensure accuracy and applicability to specific legal matters. In no event will the authors, the reviewers or the publisher be liable for any damage, whether direct, indirect or consequential, claimed to result from the use of this material.