CASE NO. 25-1424

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BENJAMIN CARTER,

Plaintiff/Appellee, v.

THE MOUNTAIN VIEW FIRE PROTECTION DISTRICT and DAVID BEEBE

Defendants/Appellants,

APPELLEE BENJAMIN CARTER'S OPENING BRIEF

Appeal from the United States District Court for the District of Colorado
The Honorable Judge Philip A. Brimmer
D.C. No. 1:23-CV-02348-PAB-STV

Arthur R. Traynor
Mooney, Green, Saindon, Murphy & Welch, P.C.
1620 Eye Street, NW, Suite 700
Washington, DC 20006
Phone: (202) 783-0010
atraynor@mooneygreen.com

Counsel for Appellee Benjamin Carter

ORAL ARGUMENT IS NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

This interlocutory appeal arises from the decision of the district court denying qualified immunity to David Beebe, the fire chief ("Chief Beebe") of the Mountain View Fire Protection District ("District"), who terminated the employment of Lieutenant Benjamin Carter ("Lt. Carter"), a for-cause first responder, without affording Lt. Carter any meaningful post-termination hearing.[1] For decades, the Supreme Court and this Court have held that when a public employer relies on limited pre-termination procedures, the Fourteenth Amendment requires a meaningful post-termination hearing with basic adversarial safeguards. The district court properly applied that settled law to the relevant facts of this case. Because Chief Beebe terminated Lt. Carter in violation of the requirements of the Fourteenth Amendment, the lower court correctly determined that Chief Beebe was not entitled to qualified immunity.

This appeal does not present a genuine dispute over the governing legal standards. Rather than accept the facts as found by the district court and present a legal challenge to those facts, Chief Beebe's opening brief wrongly attempts to reframe the case as one about contractual waiver and to recharacterize disputed factual questions regarding the adequacy of the District's disciplinary process as abstract legal issues. Much of the appeal therefore seeks review of factual sufficiency and evidentiary inferences, matters that fall outside this Court's jurisdiction on interlocutory review. For this reason, the interlocutory appeal should be denied.

[1] There are no prior related appeals.

To the extent this appeal raises reviewable legal questions, it also fails. As explained below, there is no merit to the arguments relied on by Chief Beebe in his misguided effort to cloak his clearly unlawful employment action with qualified immunity. The U.S. Constitution, not the District's collective bargaining agreement ("CBA") or internal personnel policies, sets the minimum procedural protections owed to a first responder with a protected property interest. Those constitutional protections include a meaningful post-termination hearing when the pre-termination process is abbreviated (as it was here). This critically important constitutional protection afforded employees like Lt. Carter cannot be prospectively bargained away. Because the district court correctly concluded that Lt. Carter received no such protection - by way of a meaningful post-termination hearing, and because that requirement was clearly established long before Lt. Carter's termination - the denial of qualified immunity should be affirmed.

STATEMENT OF ISSUES

(1) Whether the district court correctly determined that Chief Beebe was not entitled to qualified immunity in terminating Lt. Carter's employment because the facts as found by the district court establish a violation of clearly established constitutional law that Chief Beebe reasonably should have known threatened harm and

(2) Whether the collective bargaining agreement between the District and the Union representing Lt. Carter which failed to provide minimal due process protections to "for cause" public employees can be relied on by the District to support its claim that Lt. Carter was provided "all the process that was due"?

STATEMENT OF THE CASE

1. Lt. Carter was employed by the District as a firefighter beginning in 2009. During his employment, Lt. Carter was a member of Mountain View Professional Firefighters,

Local 3214, International Association of Firefighters ("Union"). Effective January 1, 2023, Lt. Carter was elected Union President. 6 App. 89.

2. The District is a Colorado fire protection district governed by a Board of Directors. At all relevant times, Chief Beebe served as the District's Fire Chief and had final authority over discipline and termination of firefighters. 6 App. 97.

3. Lt. Carter was a classified employee subject to discipline or termination only for cause. The terms and conditions of employment for District firefighters were governed by a CBA between the District and the Union. 6 App 96-98. The CBA incorporated and referred back to provisions of the District's employee handbook, which governed certain disciplinary procedures. 6 App. 97-98.

4. Under the District's disciplinary framework, as set forth in the employee handbook incorporated into the CBA, the Fire Chief's termination decision is described as "the final decision for the District for all purposes," and "[d]iscipline matters are not appealable to the Board." 6 App. 97. An employee may submit an "appeal" only to the Fire Chief and only on the basis of "new or additional information," which the Fire Chief alone reviews in deciding whether to reverse the termination decision. *Id*. The CBA expressly provides that any provision inconsistent with applicable federal or state law will be unenforceable. 2 App. 64.

5. On January 30, 2023, while off duty, Lt. Carter went to District Fire Station 13 to prepare bunker gear for new recruits. While at the station, Lt. Carter learned from a District vendor that a new recruit had requested removal of an American flag from the recruit's gear. 6 App. 89-90.

6. Lt. Carter raised the issue with Captain Shad Bennet and later participated in a phone call with the District's Human Resources Assistant, Gina Daly. Daly informed Lt. Carter that the request was related to religious accommodation that had been approved through the chain of command. 6 App. 90.[2]

7. Lt. Carter subsequently discussed the accommodation request with other District personnel, including Battalion Chief Flagg, who was not aware of the request. District management later learned that Lt. Carter had discussed the matter with additional employees. 6 App. 91-92.[3]

---

[2] Daly testified that she believed information about the accommodation was confidential and that she conveyed that belief, but acknowledged she did not know whether Carter was present when she did. 1 App. 14-15. Carter testified that he was never told the information was confidential. 2 App. 168. Bennett similarly testified that he does not recall Daly telling Carter that the accommodation was confidential. 5 App. 29; 5 App. 34. Beebe admitted that no policy or training identified requests for religious accommodation as confidential. 4 App. 200-201.

[3] The district court's order states that "District management… obtained information that Mr. Carter's comments [about a new hire with the religious accommodation] had been negative and potentially harassing," 6 App. 91, but the record shows that this conclusion rested entirely on vague hearsay statements attributed to four firefighters through Battalion Chief Chad Rademacher, 3 App. 57; 3 App. 180-181. Rademacher was Carter's supervisor and had recently warned Carter that continued advocacy for compliance with District rules meant that "path won't end up good for you." 3 App. 7. Weeks earlier, on January 24, 2023, Rademacher had already urged Chief Beebe to investigate Carter in an email listing generalized complaints, none of which referenced the new hire, the religious accommodation, or any statement by Carter concerning either. 3 App. 140.

None of the relied upon hearsay statements were clearly negative toward the recruit or the accommodation. Deputy Chief Webb confirmed that he interviewed only "two people who stated Carter told them directly about the accommodation," 2 App. 195, and that the sole statement attributed to Carter was that the "99% have to curtail to the 1%." *Id*. That remark was attributed exclusively to firefighter Micah Arnold, who explained that it arose during a discussion involving an HR representative and workplace pronoun usage, not as a comment directed at the recruit or opposing the accommodation itself. 3 App. 54-55. Webb

8. Prior to the initiation of the internal investigation, Lt. Carter and Chief Beebe had a contentious grievance meeting related to Lt. Carter's role as Union President and disputes between labor and management. 6 App. 92-93.[4]

9. On February 6, 2023, District leadership met regarding Lt. Carter's conduct related to the recruit's accommodation request and decided to initiate an internal investigation. 6 App. 91. On February 8, 2023, Chief Beebe and Administrative Director Pam Owens met with Captain Bennet regarding the January 30 phone call, and the District placed Lt. Carter on paid administrative leave. 6 App. 92.

10. Lt. Carter was charged with unprofessional conduct and insubordination for discussing a new recruit's religious accommodation with other employees and for allegedly making comments management viewed as negative or inappropriate. 6 App. 91; 6 App. 94-95. He was also charged with working "off the clock" for the time he spent on his day off

---

did not interview the recruit, 3 App. 180-181, and the record contains no complaint by the recruit alleging harassment or misconduct by Carter regarding the accommodation. *Id*. By contrast, Captain Shad Bennett was interviewed multiple times and re-interviewed after his initial account did not incriminate Carter, at Beebe's direction, to the point that Bennett testified, "I felt like I was being impugned." 5 App. 54. When asked to identify any instance in which he similarly re-interviewed or pressured a witness to obtain exculpatory information about Carter, Webb could not identify one. 3 App. 172.

[4] Chief Beebe acknowledged that he had stated that Carter used the union "as a weapon," 6 App. 65-70. Chief Beebe also acknowledged that he told Carter that Carter was being "targeted" after Carter raised concerns at a labor management meeting regarding senior leadership's use of District property to service personal vehicles. 4 App. 132

preparing bunker gear for new recruits. Chief Beebe appointed Deputy Chief Webb to conduct the internal investigation. 6 App. 92.[5]

11. Deputy Chief Webb did not personally interview the new recruit whose accommodation request formed the basis of the primary charge against Lt. Carter. Instead, hearsay information about statements purportedly made about the recruit was relayed to Webb through Battalion Chief Rademacher. 3 App. 180.

12. On February 27, 2023, Deputy Chief Webb and Owens met with Lt. Carter and a Union representative and provided Lt. Carter with charging materials. 6 App. 94. The materials failed to identify the names of the firefighters alleged to have made the statement attributed to Lt. Carter or to have observed the conduct underlying the charges. The charging materials also did not identify the approximately 25-30 witnesses that Webb had interviewed for the investigation. 6 App. 94-95. Lt. Carter submitted a written response on March 2, 2023. 6 App. 95.

13. On March 21, 2023, Chief Beebe and Owens met with Lt. Carter and his Union representative and provided Lt. Carter an additional opportunity to respond before a final disciplinary decision was made. 6 App. 95-96.

14. At his pre-termination meetings with Webb and Beebe, Lt. Carter "was not provided with: 1) a complete list of witness identities or their statements, 2) an opportunity to cross-

[5] Although Webb was designated as the investigator, Chief Beebe continued his involvement in the investigation process, including oversight of its scope, 4 App. 120-123, participation in discussions concerning follow-up interviews of witnesses, 5 App. 54; 3 App. 172, and ultimate authority over the charges and discipline imposed. 6 App. 97-99; 2 App. 271-72.

examine any witnesses, 3) representation by legal counsel, or 4) an independent decision-maker." 6 App. 94-96. Lt. Carter was not provided with the identities or statements of key witnesses relied upon in the investigation and was not afforded an opportunity to question, confront, or otherwise test that evidence. He was not accompanied by counsel. *Id*.

15. On April 12, 2023, Chief Beebe issued a written decision affirming Lt. Carter's termination. The letter stated that Lt. Carter had not presented "any new or additional information" and that "[a]s such, I am denying your appeal. The termination decision is not reversed." 2 App. 271-72. The letter did not provide for any additional review by the District Board or by any neutral. 6 App. 98-99.

16. After the denial of his appeal, Lt. Carter, through counsel, sought a post-termination hearing. On April 27, 2023, Lt. Carter's counsel, Naomi Perera, sent a written demand to District counsel requesting a post-termination hearing and expressly requesting "a post-termination hearing that conforms to the requirements of the Fourteenth Amendment." 4 App. 58-59. The letter specifically requested a hearing process consistent with *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), and cited *Calhoun v. Gaines*, 982 F.2d 1470 (10th Cir. 1992), *Workman v. Jordan*, 32 F.3d 475 (10th Cir. 1994), and *Nard v. City of Oklahoma City*, 153 F. App'x 529 (10th Cir. 2005), explaining that those cases require "notice of the charges, an explanation of the employer's evidence, and an opportunity to respond before termination, followed by a meaningful post-termination hearing before a neutral decisionmaker." 4 App. 59-61. The demand was sent to District counsel and copied to Chief Beebe. 4 App. 62; 6 App. 99-100.

17. The District refused to provide any further post-termination process. In a written response, District counsel stated that the District "does not agree to any further post-termination activities" and asserted that, under the "totality of the circumstances," Carter had already been provided "all the process that is due." 4 App. 59-60. District counsel further asserted that "the District's process satisfied constitutional requirements" and no hearing would be held. *Id.*; 6 App. 100-01.

18. The District did not provide Lt. Carter with any post-termination hearing. Lt. Carter was not afforded an opportunity after his termination to confront witnesses, cross-examine those who allegedly made statements supporting the charges, or otherwise test the evidence relied upon to sustain his termination. As District counsel confirmed in writing, the District "does not agree to any further post-termination activities," and would provide no additional process beyond what had already occurred. 4 App. 59-60. Chief Beebe's April 12, 2023 letter likewise made the termination final, stating that Lt. Carter had presented no "new or additional information" and that "[a]s such, I am denying your appeal. The termination decision is not reversed," with no provision for any further hearing or review. 2 App. 271-72.

19. Lt. Carter thereafter filed this action. On cross-motions for summary judgment, the district court held that Lt. Carter possessed a protected property interest in continued employment because he "could be terminated only for cause" and therefore had "a protected property interest in his continued employment." 6 App. 89-90. The trial court further held that the process afforded to Lt. Carter did not satisfy procedural due process, explaining that although Lt. Carter received notice of the charges and an opportunity to

respond before termination, he was never afforded any post-termination hearing or meaningful review. 6 App. 100-03. The district court emphasized that Chief Beebe was the final decisionmaker on Lt. Carter's termination and that the District's procedures provided no opportunity after termination for Lt. Carter to confront adverse witnesses, cross-examine those who made statements supporting the charges, or otherwise test the evidence relied upon to sustain his termination. 6 App. 103-05. The lower court rejected the District's argument that the "totality" of the pretermination process sufficed, holding instead that due process required a meaningful post-termination opportunity to be heard, which Lt. Carter was denied. 6 App. 105-07. The district court therefore concluded that the process provided was constitutionally inadequate and denied Chief Beebe's claim of qualified immunity. *Id*. The District and Chief Beebe brought their interlocutory appeal of the lower court's denial of qualified immunity.

SUMMARY OF ARGUMENT

Chief Beebe's interlocutory appeal fails for three independent reasons.

First, on the facts accepted by the district court, the constitutional violation was clearly established at the time of Lt. Carter's termination. Longstanding Supreme Court and Tenth Circuit precedent has made clear that when a public employee with just-cause protection is afforded limited pre-termination procedures, a meaningful post-termination hearing is required. Chief Beebe denied Lt. Carter any such hearing, even after receiving explicit notice of the governing law. Under these circumstances, no reasonable official could believe that the Constitution had been satisfied.

Second, Beebe's contractual-waiver theory fails as a matter of law. The Constitution, not the District's CBA or internal personnel policies, establishes the minimum procedural protections owed to a first responder with a protected property interest in continued public employment. Those constitutional protections include, among other things, a meaningful post-termination hearing when pre-termination process is abbreviated, and they cannot be prospectively bargained away. A public employer may not declare a termination decision final and substitute cursory and limited reconsideration by the terminating official for the meaningful post-termination hearing that constitutional due process mandates.

Third, much of the appeal is jurisdictionally improper. Although Chief Beebe recites the correct standard governing interlocutory review, he does not confine his arguments to legal questions arising from the facts as found by the district court. Instead, he repeatedly asks this Court to reassess the adequacy of the District's disciplinary process, to credit his own self-serving characterizations of the record, and to resolve disputed inferences in his favor. Under this Court's well-settled precedent, such fact-bound challenges are not reviewable on interlocutory appeal.

For these reasons, and because much of the appeal falls outside this Court's jurisdiction, the district court's denial of qualified immunity should be affirmed.

ARGUMENT

I. THE DISTRICT PROVIDED NO MEANINGFUL POST-TERMINATION HEARING, IN VIOLATION OF SETTLED FOURTEENTH AMENDMENT LAW.

Once a public employee with a protected property interest has been terminated, the Constitution requires a meaningful post-termination hearing.[6] That hearing must provide an opportunity to respond to the charges, confront adverse evidence, and cross-examine witnesses. The district court correctly held that the process afforded to Lt. Carter failed to meet those requirements.

Under *Loudermill*, a public employee who may be discharged only for cause is entitled, at a minimum, to "some kind of hearing" before termination or promptly thereafter. 470 U.S. at 542 (noting "this rule has been settled for some time now.") While the pre-termination process may be abbreviated, the post-termination hearing must then be more robust and must serve as the primary safeguard against erroneous deprivation. *Id*. at 546-47.

This Court has repeatedly explained that a constitutionally adequate post-termination hearing must include "notice of the charges or reasons for his discharge, an

[6] After Carter's termination, the District provided **no** post-termination hearing and expressly declined Carter's request for one. As the district court recognized, the post-termination process consisted exclusively of limited reconsideration and correspondence, not an adversarial proceeding in which Carter could test the evidence against him. Although due process does not impose a *per se* bar on the same official serving in multiple roles absent proof of actual bias, it does require a meaningful post-termination evidentiary hearing when pre-termination procedures are limited. *See Loudermill*, 470 U.S. at 546-48; *West v. Grand County*, 967 F.2d 362, 367-68 (10th Cir. 1992); *Calhoun*, 982 F.2d at 1476-77.

explanation of the evidence against him and an opportunity to present his side of the story." *Gaines*, 982 F.2d at 1476. It must also provide an opportunity to confront adverse evidence and witnesses whose credibility is at issue. *See Workman*, 32 F.3d at 480; *Copelin-Brown v. N.M. State Pers. Office*, 399 F.3d 1248, 1255-56 (10th Cir. 2005).

The district court, viewing the summary-judgment record in the light most favorable to Lt. Carter, correctly determined that those core constitutional requirements were not satisfied. The lower court found that Lt. Carter was terminated following an internal investigation in which the designated investigator did not interview the recruit whose accommodation request formed the basis of the principal charge, did not interview Lt. Carter regarding the alleged statements, and relied instead on second-hand accounts relayed by a supervisor who had then-recent conflict with Lt. Carter. Moreover, the district court also concluded that the charging materials provided to Lt. Carter did not identify the witnesses whose alleged statements were used to support the charges, and Lt. Carter was not afforded any opportunity, either before or after termination, to confront or question those witnesses.

The lower court properly ruled that the absence of witness disclosure and the inability to confront adverse evidence and test the credibility of witnesses deprived Lt. Carter due process under clearly established law. Lt. Carter was denied the meaningful post-termination hearing that the Fourteenth Amendment requires. The district court therefore correctly granted Lt. Carter summary judgment on his procedural due process claim.

II. SUPREME COURT AND TENTH CIRCUIT CASE LAW CLEARLY ESTABLISHES THAT DENYING ANY MEANINGFUL POST-TERMINATION HEARING TO A FOR-CAUSE EMPLOYEE VIOLATES DUE PROCESS.

This Court's qualified-immunity analysis requires consideration of both whether the governing law was clearly established such that a reasonable official would have understood the conduct to be unlawful, and whether the record supports the conclusion that the defendant-appellant in fact knew of and disregarded a substantial risk of violating the plaintiff's constitutional rights. Both standards are satisfied here.

A. Longstanding Supreme Court and Tenth Circuit Precedent Placed the Constitutional Violation Beyond Debate

Long before Lt. Carter became a firefighter and Beebe a chief, Supreme Court and Tenth Circuit precedent placed the relevant constitutional question beyond debate. Indeed, this Court in 2005 published an opinion expressly relied upon by the district court below in which it held that "[t]he law has been established for thirty years [that] the Due Process Clause requires the state to provide an opportunity for a hearing whenever a permanent state employee is terminated." *Copelin-Brown*, 399 F.3d at 1256 (emphasis supplied). Over twenty years later, that law remains unchanged and well settled.

On review of a decision denying a defendant qualified immunity, this Court must determine whether the facts support the view that defendant acted with deliberate indifference to plaintiff's due process rights, *i.e.,* whether the defendant knew his actions created a substantial risk of constitutional injury to the plaintiff. *Dodds v. Richardson*, 614 F.3d 1185, 1205-06 (10th Cir. 2010) (*citing Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1155 (10th Cir. 2006) (explaining that the plaintiff "must point to evidence that would

establish [the defendant] knew he was creating a situation that created a substantial risk of constitutional harm" to establish the defendant acted with deliberate indifference).

In determining whether a constitutional right was clearly established, courts must define the right with sufficient specificity to put a reasonable official on notice that the challenged conduct was unlawful but need not identify a case with identical facts. The Supreme Court has repeatedly cautioned courts "not to define clearly established law at a high level of generality" but it likewise does "not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Rather, the dispositive question is whether existing precedent has placed the constitutional question "beyond debate," such that every reasonable official would understand that the conduct at issue violates the Constitution. *Id*.; *see also Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002) (clearly established law may arise from "general statements of the law" where they apply with "obvious clarity" to the conduct in question). Consistent with this framework, a court "cannot find qualified immunity wherever we have a new fact pattern." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). In *Casey*, the Court observed that the "Supreme Court has warned that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'" *Id*. (*quoting Pelzer*, 536 at 741).

Some constitutional rules apply with obvious clarity across factual variations. The requirement of post-termination review following abbreviated pre-termination process is one such rule. A reasonable official need not locate a case involving the same collective

bargaining language to understand that eliminating all post-termination adjudication violates due process.

Where, as here, controlling precedent has long made clear both the existence of the right and specific procedural protections required, officials are not entitled to qualified immunity merely because the violation took a familiar form in a slightly different factual setting. As such, the district court correctly held that the constitutional violation was clearly established.

The clearly established right at issue is not a right to any particular procedural format, but the right of a for-cause public employee to a meaningful post-termination hearing when pre-termination procedures are limited. That principle has been settled for decades and does not depend on the specific configuration of an employer's internal disciplinary framework, whether collectively bargained or not. *See Loudermill*, 470 US at 541 (citing its earlier decision in *Vitek v. Jones*, 445 U.S. 480, 491 (1980), holding that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.").

In *Loudermill*, the Supreme Court held that while pre-termination procedures may be informal, they must be coupled with post-termination procedures providing a meaningful opportunity to contest the discharge. 470 U.S. at 546-47. Likewise, long before Lt. Carter's 2023 termination, this Circuit repeatedly held that minimal pre-termination procedures must be paired with meaningful post-termination process, and the absence of that hearing violates due process. *See Calhoun*, 982 F.2d at 1477 ("a full-blown, adversarial

post-termination hearing" is constitutionally required); *Copelin-Brown*, 399 F.3d at 1255 (no post-termination hearing is a violation of due process); *Powell v. Mikulecky*, 891 F.2d 1454, 1458-60 (10th Cir. 1989) (pre-termination process is sufficient because a full post-termination arbitration followed). In *Kelly v. Independent School District No. 12*, this Court reaffirmed that "in cases where the [pretermination] hearing is less elaborate, a full-blown, adversarial post-termination hearing, held at a meaningful time, is necessary." 80 F. App'x 36, 41 (10th Cir. 2003). *See also West,* 967 F.2d at 366-67.

The Tenth Circuit has recognized it is clearly established that minimal pre-termination procedures satisfy due process only when the employee is afforded a full, meaningful post-termination hearing by denying qualified immunity to officials who provided no post-termination hearing at all. *Copelin-Brown*, 399 F.3d 1248 (affirming denial of qualified immunity to supervisory officials where the employee was afforded no post-termination hearing, reiterating that the right to a meaningful post-termination hearing was clearly established). This precedent is consistent with well settled law in the other federal circuits which treat a post-termination hearing as the essential constitutional safeguard where pre-termination process is abbreviated.[7] Given this abundance and consistency of judicial guidance, a reasonable public employer in 2023 would have understood that declaring a termination decision "final" while denying **any** post-

[7] *See e.g. Gniotek v. City of Philadelphia*, 808 F.2d 241, 244-46 (3d Cir. 1986); *Garraghty v. Jordan*, 830 F.2d 1295, 1301-02 (4th Cir. 1987); *Schaper v. City of Huntsville*, 813 F.2d 709, 714-15 (5th Cir. 1987); *Mitchell v. Fankhauser*, 375 F.3d 477, 484-86 (6th Cir. 2004); *Michalowicz v. Vill. of Bedford Park*, 528 F.3d 530, 534-36 (7th Cir. 2008); *Winegar v. Des Moines Indep. Cmty. Sch. Dist*., 20 F.3d 895, 900-01 (8th Cir. 1994); *Walker v. City of Berkeley*, 951 F.2d 182, 184-85 (9th Cir. 1991).

termination hearing violates clearly established due process. Yet, in challenging the district court's denial of qualified immunity, Chief Beebe asks this Court to endorse precisely the opposite conclusion. He seeks a ruling that would upend well settled and long-standing precedent which would significantly curtail the constitutional protection provided to "for cause" public employees. The Court must refuse to do so and instead should leave the district court's decision undisturbed.

This Court's precedents have also clearly established the necessary content of a "full post-termination hearing" which the lower court correctly found absent here. In *Workman*, the Court explained that the post-termination hearing at issue, which it characterized as "full," afforded the employee representation by counsel and the opportunity to present evidence and cross-examine adverse witnesses. 32 F.3d at 480. In *Nard*, the Court reiterated that the post-termination hearing provided there, which the Court described as "full," included adversarial protections such as representation by counsel and the opportunity to cross-examine witnesses. 153 F. App'x at 534. Those decisions, together with *Loudermill*, have made clear for some time that declaring a termination decision "final" without even a semblance of such protections and substituting reconsideration by the terminating official for a meaningful post-termination hearing is unconstitutional.

These authorities placed the constitutional question beyond debate. A reasonable official would have understood that declaring a termination decision "final" without a hearing at which the employee can engage counsel to test evidence and witnesses does not satisfy the Fourteenth Amendment. Yet, Lt. Carter's termination letter declared the Chief's decision "final for all purposes," barred appeal to the Board or neutral, and limited any

"appeal" to a written request back to the Chief based on "new or additional information." 2 App. 267. There was no evidentiary hearing, no witness presentation, and no cross-examination, only reconsideration by the original decisionmaker, who had also repeatedly intervened to direct the investigation into Lt. Carter. 3 App. 18. That falls far short of complying with the rule clearly established in *Loudermill* and Tenth Circuit law firmly applying that decision. In denying qualified immunity, the district court remained faithful to the guidance provided by the above case law. Therefore, its decision should not be disturbed.

The authorities on which Chief Beebe principally relies - criminal waiver cases involving individualized, contemporaneous relinquishment of trial rights, commercial cases approving substitute adjudicatory mechanisms, and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), which enforced a clear and unmistakable agreement to arbitrate private sector statutory claims before a neutral - do not involve public employee terminations and do not approve the prospective elimination of a meaningful post-termination hearing required by *Loudermill*.

Likewise, Chief Beebe's reliance on *Burt v. Bernalillo Cnty. Sheriff's Dep't*, No. CIV 98-1270 JC/KBM, 1999 WL 35809447, at *5-6 (D.N.M. July 19, 1999), and the unpublished decision in *Herrera v. City of Albuquerque*, 198 F.3d 258 (10th Cir. 1999) (unpublished table decision), is misplaced. Neither case holds that a collective bargaining agreement may waive the constitutional requirement of a meaningful post-termination hearing.

In *Burt*, the district court addressed a negotiated delay in the timing of a post-suspension hearing, not the elimination of neutral post-disciplinary review. *See Burt*, 1999 U.S. Dist. LEXIS 25156, at *4-6. And in *Herrera*, the Court assumed the availability of post-termination grievance arbitration procedures and placed dispositive weight on the employee's failure to invoke them, rather than approving their contractual elimination. *See Herrera*, 1999 U.S. App. LEXIS 25562, at *6-7. Neither decision approves a scheme (like the one here) in which a public employer issues a "final" termination decision while providing no neutral, meaningful post-termination hearing as required by *Loudermill*.

In sum, controlling precedent long before Lt. Carter's 2023 termination clearly established that abbreviated pre-termination procedures must be coupled with a meaningful post-termination hearing, and that a public employer may not substitute finality and reconsideration by the terminating official for the adversarial safeguards required by the Fourteenth Amendment. That rule was clearly established beyond debate. Accordingly, a reasonable fire chief would have understood that the District's "final decision" scheme, as applied to Lt. Carter, violated due process, and qualified immunity is unavailable. As the record further demonstrates, Chief Beebe had actual knowledge of these governing constitutional requirements and nonetheless disregarded a substantial risk of violating Lt. Carter's rights.

B. Chief Beebe Was Explicitly Warned That the District's Process Violated Due Process and Proceeded Anyway

Chief Beebe's subjective knowledge of clearly established law prior to his decision to deny Lt. Carter any meaningful post-termination hearing establishes deliberate

indifference to a substantial risk of constitutional harm. An official acts with deliberate indifference where he has actual knowledge of a serious risk of constitutional injury and nonetheless proceeds in conscious disregard of that risk. Although the qualified-immunity inquiry is objective, courts have recognized that evidence an official was actually aware of the governing law or of a substantial risk of constitutional harm is relevant in assessing the reasonableness of the challenged conduct. *See, e.g.*, *Campbell v. Johnson*, 586 F.3d 835, 840 (11th Cir. 2009) (holding that a Fourteenth Amendment due process violation may be established by evidence that the defendant "had **subjective** knowledge of a risk of serious harm and disregarded that risk by actions beyond mere negligence" (emphasis supplied)). Consistent with that principle, the Fourth Circuit has explained that where a constitutional violation requires knowing disregard of a serious risk, an official who acts with such awareness cannot plausibly claim to have believed his conduct comported with clearly established law. *See Thorpe v. Clarke*, 37 F.4th 926, 940-41 (4th Cir. 2022); *Pfaller v. Amonette*, 55 F.4th 436, 446-47 (4th Cir. 2022).

It is therefore significant that, before Chief Beebe finalized his decision on "appeal" of Lt. Carter's termination, Lt. Carter's counsel expressly advised both the District and Chief Beebe that the disciplinary process being employed failed to satisfy the constitutional requirements of due process. 4 App. 52-54. In that correspondence, counsel explained that:

> Both Lt. Carter and our office have repeatedly asked for full investigative materials that Chief Webb and the District gathered in the course of its investigation, including the identities of witnesses, and recordings of the numerous witness interviews that Chief Webb conducted, as well as any other materials [that] were examined or considered by the District. The District has refused to provide any of these materials beyond its conclusory

> summaries of the evidence. As was already explained to District legal counsel, in addition to posing serious and obvious Constitutional due process concerns, the District's failure to share this information violates state law under the Colorado Firefighter Safety Act. Furthermore, for an organization that claims to value honesty and fairness, the District does not appear to be carrying through its stated mission. Lt. Carter was never given an opportunity to fully review the actual evidence upon which the District purports to act, or even know the identity of the witnesses who provided information to the District. This places Lt. Carter in a nearly impossible position where he is not able to address the accusations against him except in the most general terms because he doesn't know what those accusations are, except in the most general terms.

2 App. 268. Shortly thereafter, Lt. Carter's counsel again communicated with counsel for the District, copying Chief Beebe, and expressly grounded Lt. Carter's demand for post-termination process in controlling Supreme Court and Tenth Circuit precedent:

> In light of the Chief's decision below, Lt. Carter would request that he be provided with an opportunity to defend his due process interests in his job under the Fourteenth Amendment through a hearing process that conforms to the requirements of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). "[W]hen a person's employment can be terminated only for specified reasons, his or her expectation of continued employment is sufficient to invoke the protections of the Fourteenth Amendment." *West v. Grand County*, 967 F.2d 362, 366 (10th Cir. 1992). The CBA, and the Resolution granting IAFF 3214 collective bargaining rights clearly provides Lt. Carter with a property interest in his job as he may only be terminated for just cause. *See* Article 4 section 4.1.3 of the CBA; *See also, Skogen v. City of Overland Park*, Civil Action No. 08-2657-DJW., 2010 BL 55813, at *11 (D. Kan. Mar. 15, 2010) (noting that "whether Plaintiff has a protected property interest will turn on whether Plaintiff was terminable only for cause."). Given that Lt. Carter was never given a meaningful opportunity during the pre-termination process, and through the post-termination "appeal" process dictated by Article XXI, section 21.10 to know the identity of the witnesses against him, cross-examine them, or to test, through fact-finding, the determinations of the Chief, he is entitled to this process now. As was held in *Calhoun v. Gaines*,

> "*Loudermill* established that some form of pretermination hearing, plus a full blown adversarial post-termination hearing," are required when a property interest in continued employment is at stake. 982 F.2d 1470, 1476 (10th Cir. 1992). *See also, Workman v. Jordan,* 32 F.3d 475, 480 (10th Cir. 1990) ("A 'full post termination hearing' is understood to include the right to representation by an attorney and the right to cross-examine adverse witnesses.") (citations omitted); *Nard v. City of Okla. City*, 153 F. App'x 529, 534 (10th Cir. 2005).

4 App 58-59.

Although such notice is not required to establish that a constitutional violation occurred, it is highly probative of Chief Beebe's actual knowledge. These letters did not merely object in general terms, but precisely identified the constitutional deficiency in the District's process, cited controlling authority, and demanded the very post-termination hearing that was later denied. Chief Beebe nonetheless chose to declare his termination decision "final" and limit post-termination recourse to reconsideration by himself. Proceeding in the face of that notice establishes conscious disregard of a known constitutional risk.

Chief Beebe does not cite a single Supreme Court or Tenth Circuit decision holding that a for-cause public employee who receives only minimal pre-termination process may be denied a meaningful post-termination hearing. Nor does he cite any controlling authority holding that *Loudermill* rights may be waived by a collective bargaining agreement or employer handbook. To the contrary, *Loudermill* and numerous post-*Loudermill* decisions of this Court confirm that the absence of a meaningful post-termination hearing, particularly where the termination decision is declared final by the decisionmaker, violates due process.

Accepting the facts as found by the district court, Chief Beebe denied Lt. Carter **any** post-termination hearing, denied him the opportunity to confront adverse witnesses, and rejected a formal demand grounded explicitly in controlling precedent. Under these circumstances, no reasonable official could believe that the Constitution had been satisfied.

In short, this is not a case in which an official reasonably misapprehended unsettled law or confronted an unclear constitutional boundary. Chief Beebe was expressly informed and advised, before finalizing Lt. Carter's termination, that the District's disciplinary scheme failed to provide the meaningful post-termination hearing required by *Loudermill* and this Court's precedents. He nonetheless chose to proceed in conscious disregard of that risk.

The record evidence discussed above independently forecloses qualified immunity, even apart from the objective clarity of the governing law. The district court therefore correctly concluded that the constitutional violation was clearly established and that Chief Beebe was not entitled to qualified immunity.

III. LT. CARTER'S CONSTITUTIONAL RIGHT TO A MEANINGFUL POST-TERMINATION HEARING COULD NOT BE WAIVED BY COLLECTIVE BARGAINING AGREEMENT.

Chief Beebe's waiver theory fails for two independent reasons. First, procedural due process establishes a constitutional minimum that cannot be eliminated, displaced, or undermined by contract, collective bargaining agreement, or personnel policy. Second, even where waiver doctrines apply in other contexts, they do not permit the prospective relinquishment of a public employee's right to a meaningful post-termination hearing required by the Fourteenth Amendment.

A. Procedural Due Process Sets a Constitutional Floor that Cannot be Eliminated by Contract.

The Due Process Clause of the Fourteenth Amendment establishes minimum procedural protections that apply once a public employee possesses a constitutionally protected property interest in continued employment. Those minimum protections are a matter of federal constitutional law and cannot be eliminated, reduced, or displaced by contract, collective bargaining agreement, or personnel policy.

As the Supreme Court has made clear, "[t]he categories of substance and procedure are distinct." Accordingly, "[o]nce it is determined that the Due Process Clause applies, 'the question remains what process is due.'" *Loudermill*, 470 U.S. at 541 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). While state law or a collective bargaining agreement may define the property interest that triggers due process, "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate." *Loudermill*, 470 U.S. at 541.

Courts therefore assess the adequacy of procedural protections independently of any contractual or statutory scheme. The fact that an employer has complied with the procedures set forth in a collective bargaining agreement or personnel handbook does not, by itself, resolve the constitutional inquiry. Nor does the mere existence of negotiated grievance procedures, standing alone, diminish the employer's obligation to provide the process that the Constitution requires.

The constitutional defect here does not turn on Lt. Carter's sophistication, bargaining role, or subjective understanding of the disciplinary scheme. Even an express, individualized waiver by a public employee cannot authorize a public employer to make a termination decision final after minimal pre-termination process and no post-termination review, because the Due Process Clause limits what procedures a government employer may constitutionally dispense with, regardless of consent.

This Court has repeatedly recognized this distinction. In *Hulen v. Yates*, the Court explained that "once the property right is established, it is purely a matter of federal constitutional law whether the procedure afforded was adequate," and courts "should pay no attention to whether the state has complied with procedures mandated by state law." 322 F.3d 1229, 1247 (10th Cir. 2003).

The inverse is equally true. A public employer does not satisfy due process merely by following its own contractual or policy-based procedures if those procedures fall **below** the constitutionally required minimum. As this Court has explained, "[a] failure to comply with state or local procedural requirements does not necessarily constitute a denial of due process," but the critical question is whether what was delivered is "a procedure which itself falls short of standards derived from the Due Process Clause." *Hicks v. City of Watonga*, 942 F.2d 737, 746 n.4 (10th Cir. 1991) (quoting *Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir. 1986)). Similarly, in *Hennigh v. City of Shawnee*, this Court held that "[t]he Constitution does not require that each individual receive the procedural guarantees provided for by the instrument which bestows a property interest." 155 F.3d 1249, 1256 (10th Cir. 1998). *See also Levitt v. Univ. of Tex.*, 759 F.2d 1224, 1229 (5th Cir. 1985)

("Even if the University failed to follow its own rules, it nevertheless gave [the professor] all the process to which he was entitled under the Constitution."). These cases do not hold that collectively bargained procedures are irrelevant to the due-process analysis; rather, they confirm that contractual procedures, including those set forth in a collective bargaining agreement, satisfy due process **only** to the extent they provide constitutional due process.

Accordingly, while a collective bargaining agreement or personnel handbook may supply procedures that supplement constitutional requirements, such instruments cannot define away nor decrease the Constitution's baseline protections. The dispositive question is not whether the employer complied with the negotiated scheme, but whether the scheme, as applied, provided the process that due process demands. *Loudermill* forecloses any contrary approach.

B. General Waiver Doctrines Do Not Permit Prospective Waiver of Post-Termination Due Process in Public Employment.

The Constitution, not a collective bargaining agreement or personnel handbook, sets the minimum procedural floor for public employees with a for-cause property interest. That floor cannot be collectively bargained away.

In support of his waiver argument, Chief Beebe relies on cases such as *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), *Brady v. United States*, 397 U.S. 742, 748 (1970), and *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), which concern criminal defendants knowingly and voluntarily waiving trial-related rights in case-specific settings. Other authorities, such as *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 184-86 (1972), address

commercial cognovit clauses in which judicial oversight permits waiver of prior notice and hearing while judgment is still entered by a court. None of these cases holds that a public employer and a union may prospectively negotiate away the constitutionally required *Loudermill* hearing rights owed to a for-cause public employee.[8]

Even where constitutional rights may be waived, courts apply a strong presumption against waiver and require an intentional, knowing, and voluntary relinquishment of a known right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Brookhart v. Janis*, 384 U.S. 1, 4-5 (1966). A waiver cannot be presumed "from a silent record." *Boykin*, 395 U.S. at 243. Here, Chief Beebe identifies no language in the collective bargaining agreement that would support a finding that Lt. Carter expressly relinquished his right to a meaningful post-termination hearing, nor any evidence that Lt. Carter knowingly agreed to forgo the adversarial protections this Court has recognized as part of a full post-termination hearing. *See, e.g. Workman,* 32 F.3d at 480; *Nard*, 153 F. App'x at 534.

Chief Beebe's reliance on *Pyett* underscores the failure of his waiver theory. *Pyett* enforced a collective bargaining agreement between private parties only because it contained a 'clear and unmistakable' agreement to submit private sector statutory claims to arbitration before a neutral decisionmaker. *Id*. at 258. No comparable language appears

[8] Indeed, Supreme Court decisions recognizing waiver of procedural due process rights, including *D.H. Overmyer Co*., have involved waivers of the timing or form of notice and hearing, not the **elimination** of neutral adjudication altogether. In *Overmyer*, judgment was still entered by a court, and the Court emphasized the narrow, negotiated nature of the waiver in a commercial setting between sophisticated parties. No Supreme Court decision has approved a government employer's **prospective elimination** of all neutral post-deprivation adjudication for a for-cause public employee, which is precisely what the District's disciplinary scheme does here.

here, and, critically, the District's process did not substitute any neutral adjudicatory forum at all. Moreover, the CBA's savings clause further confirms that provisions inconsistent with applicable law, including the Constitution's Fourteenth Amendment, are unenforceable. *Pyett* therefore confirms, rather than undermines, that no constitutional rights were waived.

Accepting Chief Beebe's novel waiver theory would permit public employers to contract around the Constitution simply by labeling termination decisions "final" and limiting post-termination process to reconsideration by the same official. *Loudermill* forecloses that result. The dispositive question remains whether the District's employment policies provided Lt. Carter with a meaningful post-termination hearing that satisfied clearly established constitutional standards, not whether the District adhered to a collectively bargained disciplinary scheme.[9]

IV. MUCH OF THIS APPEAL IS JURISDICTIONALLY BARRED BECAUSE IT SEEKS FACTUAL REWEIGHING, NOT REVIEWABLE LEGAL QUESTIONS.

To the extent that Chief Beebe's interlocutory appeal asks this Court to revisit factual findings and determinations made by the district court, such a request should be denied as improper and beyond the scope of this appeal. As previously discussed, this appeal arises from the district court's denial of qualified immunity at summary judgment. On interlocutory review of a qualified-immunity denial, this Court's jurisdiction is limited

[9] Courts routinely treat collectively bargained grievance arbitration procedures as potentially satisfying due process because they provide post-termination adjudication before a neutral decisionmaker, not because they authorize the elimination of post-termination process. *See, e.g., Hennigh*, 155 F.3d at 1256; *Powell*, 891 F.2d at 1458-60. That kind of protection, however, is not provided by Beebe and the District in this case.

to neat, abstract issues of law. *See Johnson v. Jones*, 515 U.S. 304, 317-20 (1995); *McBeth v. Himes*, 598 F.3d 708, 713-14 (10th Cir. 2010).

This Court lacks jurisdiction to review arguments that merely contest the district court's factual determinations or ask the Court to credit appellant's characterization of the record - such as Chief Beebe's repeated assertions that Lt. Carter received "ample pre-disciplinary process," "extensive process," or the "full extent of the process" required (Appellant Br. 15-17, 24), characterizations that depend on resolving disputed inferences about the adequacy of the procedures provided and that the district court expressly rejected in denying qualified immunity. "Government officials may not appeal pretrial orders denying qualified immunity to the extent the order decides nothing more than whether the evidence could support a finding that particular conduct occurred." *Gonzales v. Hernandez*, 4 F. App'x 743, 746 (10th Cir. 2001) (citing *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997)).

To the extent that Chief Beebe asks this Court to reassess the factual sufficiency of the district court's determinations as to the procedures provided, to reweigh evidence concerning adversarial safeguards not provided, or to substitute his own self-serving characterization of the record for that adopted by the district court, this Court should conclude it lacks jurisdiction. The only questions properly before the Court are legal ones: whether the facts as found by the district court establish a violation of clearly established constitutional law which support the denial of qualified immunity and whether an employee's right to due process can be implicitly waived in a collective bargaining agreement. Those questions are conclusively addressed in the preceding sections and

support a decision by the Court to uphold the district court's denial of qualified immunity to Chief Beebe.

CONCLUSION

The district court correctly denied qualified immunity. Chief Beebe's contractual-waiver theory cannot overcome the constitutional requirement for a meaningful post-termination hearing, and the governing law was clearly established well before Lt. Carter's termination. Therefore, the denial of qualified immunity should be affirmed.

Respectfully submitted,

/s/ Arthur R. Traynor

Arthur R. Traynor
Mooney, Green, Saindon, Murphy & Welch, P.C.
1620 Eye Street, NW, Suite 700
Washington, DC 20006
Phone: (202) 783-0010
atraynor@mooneygreen.com

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2026, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all counsel of record.

Dated: January 28, 2026

/s/ Arthur R. Traynor

Arthur R. Traynor
Mooney, Green, Saindon, Murphy & Welch, P.C.
1620 Eye Street, NW, Suite 700
Washington, DC 20006
Phone: (202) 783-0010
atraynor@mooneygreen.com