ESSAY QUESTION NO. 7

Answer this question in booklet No. 7

Edgar works for the Alaska Education Outreach Project (the Project). The Project is a nonprofit entity established by the Alaska State Legislature. The Project conducts evaluations of pre-kindergarten education programs for at-risk children. The legislature uses the evaluations to determine funding levels for recipient programs. The Project also administers the grants through which the funds are delivered to programs. The Project's budget comes from the legislature. It is run by a board of private citizens, elected by members of communities in which the Project operates.

Edgar's duties are to travel throughout the state of Alaska to evaluate the pre-kindergarten programs for the Project. To conduct the evaluations, Edgar interviews staff and consumers of recipient programs and inspects financial files of the recipient programs. Student and personnel information must be kept confidential. The evaluations themselves are required by the Project to be confidential until their publication to the legislature to maintain the fairness of the process. Edgar was hired in January; the term of his position is for one year although he may be terminated for cause.

In his personal time and on his own computer, Edgar maintains a blog. Prior to publication of evaluations, Edgar posted to his blog unflattering descriptions of the recipient communities he had visited. The postings included Edgar's opinion that State money was poorly spent in these communities, that the teachers were incompetent and not well-qualified, that the students were poor learners with low potential and that misappropriation of state funds had occurred. In these posts, Edgar did not disclose the names of staff, teachers and students, but described them in sufficient detail that they were easily identifiable within their communities.

Edgar's supervisor, Sally, was alerted to Edgar's blog by several employees from the Project and by the directors of programs recently evaluated by the Project. In addition, several directors of programs Edgar was scheduled to visit contacted Sally to tell her to send out a different evaluator. Staff did not feel comfortable being evaluated by Edgar and the directors did not want Edgar to have access to students in light of the posts on his blog disparaging the children. The Project had to hire a temporary evaluator to complete that year's assessments.

In response, Sally called a meeting on August 1 with Edgar and informed him that he was being transferred to a position that did not include contact with recipient programs. Sally also told him that unless he promised to refrain from commenting on any topic related to the Project on his blog, he would be terminated. Edgar asked if he could present his side of the story. Sally

explained that there were no facts in dispute as the blog spoke for itself. Edgar refused to make the promise requested, and was terminated.

Discuss:

1. Whether Edgar's transfer violated his right to free speech under the Alaska Constitution.

2. Whether Sally can constitutionally require Edgar to refrain from commenting on any topic related to the Alaska Education Outreach Project on his blog.

3. Whether the procedure by which Edgar was terminated comported with the requirements of due process under the Alaska Constitution.

GRADERS' GUIDE
*** * * QUESTION NO. 7 * * ***
CONSITUTIONAL LAW

State Action 20 Points

All three questions call for a threshold inquiry whether there is any state action; if there is no state action, then the Project is not bound by the state and federal constitutions. The Project is probably a quasi-public entity and its conduct is therefore state action for purposes of constitutional analysis.

An ostensibly private organization may be considered "quasi-public" and its conduct may be state action for purposes of constitutional analysis. In such cases, it "may be fairly treated as [the action] of the State itself." *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974), *quoted in United States Jaycees v. Richardet,* 666 P.2d 1008, 1013 (Alaska 1983).

In *Valley Hospital v. Mat-Su Coalition For Choice*, 948 P.2d 963 (Alaska 1997), the Alaska Supreme Court applied the test it articulated in *Storrs v. Lutheran Hospitals and Homes Society, Inc.*, 609 P.2d 24 (1980), to consider whether Valley Hospital was a "quasi-public" institution and was bound by the state constitutional right to privacy.

That test is:

1. Whether the organization has a special relationship to the state.
2. The source of the organization's budget, whether public or private.
3. Whether the organization is required by law to operate in a public manner.
4. The governance structure of the organization.

Here, the Project is probably a quasi-public entity. It has a special relationship to the state because it administers a funding stream established by the legislature, a public function. It is itself wholly funded by the legislature. Its mandate is to evaluate all programs given public money under the grant process, so it is required to operate in a public manner. Its board is elected by members of the community.

Whether Edgar's transfer violated his right to free speech under the Alaska Constitution. 35 points

The agency's action probably did not violate Edgar's right to free speech. Although Edgar's speech included matters of public concern, the balancing test articulated in *Pickering v. Board of Education* and adopted by *State v. Haley* establishes that the State's interests as an employer probably outweigh the protected speech interests in this case and the speech was therefore not protected. Thus, even if Edgar was transferred based on the speech at issue (Edgar's blog), this did not violate Edgar's free speech rights.

According to Article I, Section 5, of the Alaska Constitution, "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

The Alaska Supreme Court has held that the state constitutional right to free speech is at least as protective as the federal right. *Mickens v. State*, 640 P.2d 81, 83 (Alaska 1981). A three-pronged showing is required to establish that an employee's discharge violated his free speech right: 1) that he engaged in protected activity; 2) that this activity was a "substantial" or "motivating" factor in the decision to fire him; and 3) that the state has failed to demonstrate that he would have been fired even if the protected speech had not occurred. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287 (1977*).* The employee bears the burden of proving the first two criteria, while the employer must disprove the third. *Id. See also Wickwire v. State*, 725 P.2d 695 (Alaska 1986).

However, the right to free speech is not absolute and is subject to balancing, in this case against the state's interests as an employer. The Alaska Supreme Court applies the same test as that in *Pickering v. Board of Education*, 391 U.S. 563 (1968), to determine whether the speech is protected speech in the context of public employment. *State v. Haley*, 687 P.2d 305 (Alaska1984).

In *Pickering,* the United States Supreme Court held that a local board of education violated the federal free speech rights of a public employee when it dismissed a teacher who had written a letter critical of the school board which was published in a local paper. *Pickering*, 391 U.S. at 564. The Court explained in *Pickering* that when analyzing the free speech rights of a public employee, it is necessary to balance the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees, against the interests of the employee, as a citizen, in commenting upon matters of public concern. *Id.* at 568.

In *State v. Haley*, 687 P.2d 305 (Alaska1984), the Alaska Supreme Court applied *Pickering* when it held that it was a violation of a legislative researcher's free speech rights to terminate her for an interview she gave on television regarding the effects of globalization. *Id.* at 311-315.

To balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs, a court should consider the following factors:

(1) maintenance of discipline by immediate superiors;
(2) preservation of harmony among co-workers;

(3) maintenance of personal loyalty and confidence when necessary to the proper functioning of a close working relationship;
(4) maintenance of the employee's proper performance of daily duties;
(5) public impact of the statement;
(6) impact of the statement on the operation of the governmental entity; and
(7) existence or nonexistence of an issue of legitimate public concern. *Haley*, 687 P.2d at 311 (citing *Pickering,* 391 U.S. at 569-73).

Subsequent cases have established that the burden is on the employer to demonstrate not only that the exercise of the employee's rights substantially and materially interfered with the discharge of his duties and responsibilities, but also that the prevention of the disruption outweighed the employee's interest in commenting on, and the public's right to be informed about, matters of public concern. *See City and Borough of Sitka v. Swanner*, 649 P.2d 940, 944 (Alaska 1982) (citing *Porter v. Califano*, 592 F.2d 770, 779 (5th Cir. 1979); *Hostrop v. Board of Junior College Dist. No. 515*, 471 F.2d 488, 492 (7th Cir. 1972), *cert. denied* 425 U.S. 963 U.S. 963 (1976); *Battle v. Mulholland*, 439 F.2d 321, 325 (5th Cir. 1971)).

This case is distinguishable from *Haley and Pickering* and probably does not implicate protected speech. In those cases, there was no evidence that the employee's speech had impacted the factors identified in *Pickering*. Here, although Edgar's blog comments do involve matters of public concern, the other factors weigh against finding protected speech. Edgar's blog affected the maintenance of discipline by his immediate supervisors because the evaluation process required confidentiality. Edgar's performance of his duties was affected because recipient programs refused to work with him. The blog adversely impacted the Project's operations. Although the State has the burden to demonstrate these factors, there is case-specific evidence that Edgar's job required confidence to maintain his relationships with the recipient programs; his failure to maintain confidence thus presents an issue of discipline. Edgar's blog posts undermined Edgar's ability to do his job because directors of recipient programs refused him access to their programs. The posts adversely impacted the operation of the Project because it had to hire an additional employee to perform the work that Edgar was hired to do.

Edgar's speech is probably not protected. Therefore the transfer, even if based on his blog posts, would not violate his right to free speech.

Whether Sally can constitutionally require Edgar to refrain from commenting on any topic related to the Alaska Education Outreach Program on his blog. 20 points

Sally can not require Edgar to promise not to discuss any issue regarding the Project on his blog. This constitutes a prior restraint which would almost certainly be impermissible. A prior restraint is an official restriction imposed

upon speech or other forms of expression in advance of actual publication, in contrast to a subsequent punishment, which is a penalty imposed after the communication is made. *See State v. Haley*, 687 P.2d 305, 315 (Alaska 1984). Prior restraints are constitutionally disfavored because they subject to government scrutiny and approval all expression in the area controlled, the innocent and borderline as well as the offensive, and because they seek to exclude the speech from the marketplace of ideas by preventing dissemination of the speech at issue. *Id.* (citing Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648 (1955)). A prior restraint has a heavy presumption against its constitutional validity. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). A system of prior restraints is barred unless there is compelling proof that a prior restraint is essential to a vital government interest. *See State v. Haley*, 687 P.2d 305, 315 (citing *New York Times Co. v. United States*, 403 U.S. 713, 726-27 (1971)).

In this case, the Project will not likely be able to demonstrate that a prior restraint is essential to a vital government interest; the blanket prohibition on commenting on "any topic related to the Program" is overbroad and therefore not essential to a vital government interest. Therefore, he could not be terminated for refusing to promise not to comment on his blog about the Project.

Whether the procedure by which Edgar was terminated comported with the requirements of due process under the Alaska Constitution. 25 points

The procedure by which Edgar was terminated did not comport with Alaska's due process requirements because Edgar was entitled to a pre-termination hearing. Article One, Section 7 of the Alaska Constitution establishes that "[n]o person shall be deprived of life, liberty, or property without due process of law." The first step in analyzing a due process claim is to determine whether the plaintiff has been deprived of life, liberty or property as defined under the Due Process Clause. *Breeden v. City of Nome,* 628 P.2d 924, 926 (Alaska 1981).

Property interests, however, are not created by the Constitution. Instead, they are created and their dimensions 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. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Because Edgar had five months left on his contract, he had a property interest in his employment for that period of time. He was entitled to due process before being deprived of that property right.

Like the federal constitution, the Alaska constitution affords pre-termination due process protection to a public employee who may only be terminated for just cause. *McMillan v. Anchorage Community Hospital,* 646 P.2d

857, 864 (Alaska 1982). In *Nichols v. Eckert,* 504 P.2d 1359, 1365 (Alaska 1973), the court ruled that a post-termination hearing was constitutionally deficient because the discharged employee was not permitted to call witnesses on her behalf. Although a full judicial hearing is not required, the employee must be allowed to present a defense by testimonial and other evidence. *See Storrs v. Municipality of Anchorage*, 721 P.2d 1146, 1150 (Alaska 1986).

Here, Edgar's contract allowed him only to be terminated prior to the end of the contract for cause. He therefore had a right to a pre-termination hearing. Edgar did have a meeting with his supervisor, Sally, but this was not sufficient under Alaska law because he was not allowed to present a defense by testimonial and other evidence. In fact, there is no evidence that he was given any opportunity to speak at all at the meeting. Instead, Sally informed him of his transfer, and demanded that he submit to a prior restraint on communication on his blog. When Edgar asked if he could present his side of the story, Sally refused. This procedure did not comport with Alaska's due process guarantees.

1. There is a threshold question whether there is state action in this fact pattern.

   a. Quasi-public organizations may be state actors for purposes of constitutional analysis.

   b. Factors to consider in determining whether organization is quasi-public:
      i. Whether the organization has a special relationship to the state.
      ii. The source of the organization's budget, whether public or private.
      iii. Whether the organization is required by law to operate in a public manner.
      iv. The governance structure of the organization.

   c. Analyze factors and conclude the Project is quasi-public and its actions are "state action for purposes of constitutional analysis.

2. Transfer of Edgar probably did not violate his free speech rights.

   a. Whether termination violates free speech requires three part inquiry.
      i. Edgar engaged in protected speech.
      ii. Protected speech was a substantial factor in adverse employment action.
      iii. State can demonstrate that Edgar would have been terminated regardless of protected speech.

   b. Whether speech is protected speech requires inquiry
      i. maintenance of discipline by immediate superiors;
      ii. preservation of harmony among co-workers;

iii. maintenance of personal loyalty and confidence when necessary to the proper functioning of a close working relationship;
iv. maintenance of the Edgar's proper performance of daily duties;
v. public impact of the statement;
vi. impact of the statement on the operation of the governmental entity; and
vii. existence or nonexistence of an issue of legitimate public concern.

c. Edgar's speech is not protected speech, therefore transfer did not violate free speech rights.

3. Prior Restraint on speech is probably unconstitutional.

   a. A prior restraint is an official restriction imposed upon speech or other forms of expression in advance of actual publication.

   b. A system of prior restraints is barred unless there is compelling proof that a prior restraint is essential to a vital government interest.

   c. The prior restraint here would be barred because there is no compelling proof that prior restraint is essential to a vital government interest.

4. Edgar's termination did not satisfy due process requirements.

   a. Edgar had due process rights because he had a property right in his employment.

   b. He was therefore entitled to due process prior to termination.
      i. Due process in this context means a pre-termination hearing.
         1. Judicial hearing not necessary, but he had a right to present testimony and evidence.
         2. Although he had a meeting with Sally in which he was told of the transfer and given the opportunity to comply with the unconstitutional prior restraint, this was insufficient because he was never given an opportunity to present his side of the story, offer testimony or other evidence.