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STATE OF WISCONSIN PERSONNEL BOARD

GEORGE SCHROEDER, Appellant, v. JOHN C. WEAVER, President, University of Wisconsin, Respondent. Case No. 73-24	OPINION AND ORDER ON MOTION TO REINSTATE

Before AHRENS, Chairman, SERPE, JULIAN, STEININGER, and WILSON.

OPINION

On January 15, 1973, George M. Schroeder, a Craftsman Painter at the University of Wisconsin - Stevens Point in Stevens Point, Wisconsin was discharged for insubordination. He filed a timely appeal and, at the pre-hearing conference in the matter, moved that he be reinstated on the grounds that he was discharged, without being first accorded a full evidentiary hearing before an impartial tribunal, with the right to cross examine witnesses against him and present his own witnesses and that, therefore, he was being deprived of a "property interest" in his job in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The authority for Appellant's motion at this time was Kennedy v. Sanchez, 349 F. Supp. 863 (1972). In that case, a three judge District Court held that the procedures under the Lloyd-LaFollette Act, which provided for a 30-day notice of a proposed discharge to a federal employe and an opportunity for the employe to respond in writing or orally and, further, if the discharge is implemented then to a full trial-type evidentiary hearing,

was constitutionally inadequate. The government appealed the decision to the United States Supreme Court, where the matter was decided April 16, 1974. See Arnett v. Kennedy, 94 S. Ct. 1633 (1974). The Board has not issued its Opinion and Order on the Appellant's motion earlier since it was awaiting the Supreme Court's resolution of the questions at issue.

In its decision in such case, the Court held that a tenured federal employe may be removed from his position without first being given the opportunity to have a trial-type hearing. The basis for this result rests upon two views of the applicable law. The first, expressed in Justice Rehnquist's opinion, is that since Congress specifically provided for a hearing after discharge that such legislation determines the employe's rights. The second view, expressed by Justice Powell, recognizes a tenured employe's job as a property interest, which must be afforded the protections of the Constitution, notwithstanding the manner in which Congress chooses to protect said right. However, he concludes that in balancing the competing interests on the Government in expeditiously removing an employe and the employe's interest in uninterrupted employment, the existing procedures are constitutionally adequate. Those two views together represent the thinking of a majority of the Court on this issue. Two other judges joined Justice Rehnquist, while one other judge joined Justice Powell to constitute a majority of five. Four justices found the procedure constitutionally inadequate.

The majority concurring opinion makes reference to the existence of some pre-termination procedures. It said:

> Appellee also argues that the absence of a prior evidentiary hearing increases the possibility of wrongful removal and that delay in conducting a post-termination

> evidentiary hearing further aggravates his loss. The present statute and regulations, however, already respond to these concerns. The affected employee is provided with 30 days advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded back pay if reinstated. [Citations omitted.] These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful.
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> On balance, I would conclude that a prior evidentiary hearing is not required and that the present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests.
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> Kennedy v. Arnett, supra, at 1652.

The question left unanswered by Justice Powell is whether these existing Federal pre-termination procedures are the minimal procedures necessary to withstand constitutional attacks. If he means that, he has not said so. Rather, he says that such procedures "comport with due process." We conclude that due process requires some pre-termination procedures to minimize the possibilities of a tenured public employe being erroneously or arbitrarily discharged, but the bare minimal requirements have not yet been clearly defined. The present state of the record in this case does not permit us to define these minimal requirements.

The record in this case does not contain any stipulated facts relative to what, if any, pre-termination procedures took place in this case.

Respondent, in his brief, argues that the pre-termination procedures were constitutionally adequate. He argues as follows:

> Prior to terminating the Appellant, a pre-termination conference was held. At this conference, Appellant was informed of the basis for recommending his discharge. The person recommending discharge was present and Appellant was able to confront him. Appellant was permitted to introduce information in his own behalf. At the conclusion of the conference, Appellant's Supervisor's Supervisor determined that the basis for recommending discharge was valid and informed Appellant.
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> Brief of Respondent at 7.

These alleged procedures differ in some respects from those involved in the federal procedure applicable in Kennedy, supra. No notice of the proposed discharge action was apparently given prior to the pre-termination conference. On the other hand, the appointing authority who was not personally involved in the matter in the same way as in Kennedy convened the conference, and the Appellant was able to confront his immediate supervisor, who was recommending his discharge. Neither of these latter two elements were present in Kennedy, where the procedure was held constitutionally adequate. The pre-termination conference facts are not proven facts in the record, but are merely allegations made in the Respondent's brief. The Appellant and the Respondent will undoubtedly desire to lay the facts of the matter before the Board when the matter comes on for hearing.

Without any factual record to enable us to define what minimal pre-termination procedures due process requires, we conclude that Appellant's motion to reinstate presently should be denied. Appellant may renew his motion concerning the adequacy of the pre-termination procedures at the hearing on the merits of the case. Berteaux v. Wettengel, Case No. 74-31, June 28, 1974; Krantz v. Schmidt, Case No. 8, August 3, 1973.

ORDER

IT IS ORDERED that the Motion to Reinstate is denied without prejudice to its renewal at the hearing on the merits and that the matter be forthwith scheduled for hearing.

Dated July 22, 1974

STATE PERSONNEL BOARD

BY

William Ahrens

William Ahrens, Chairman