STATE OF WISCONSIN PERSONNEL COMMISSION

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RONALD PAUL,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 87-0147-PC

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DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of a discharge. This matter is before the Commission on appellant's motion for summary judgment on the ground that respondent failed to provide appellant with the minimum requirements of due process at the pretermination hearing. The parties have filed briefs and affidavits. The following findings appear to be undisputed and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. By decision dated May 28, 1987, in case number 85-0216-PC, the Commission rejected appellant's earlier discharge due to procedural defects in the pretermination process. Upon remand, respondent restored appellant to a Correctional Officer 6 (CO 6) position at Kettle Moraine Correctional Institution (KMCI) effective July 14, 1987.

2. Respondent notified appellant of a predisciplinary hearing to be held on July 14, 1987, immediately following appellant's reinstatement. The hearing was convened as scheduled. Present were appellant, his attorney, the Personnel Manager in respondent's Office of Human Resources (OHR),

the KMCI Personnel Manager, and appellant's immediate supervisor, who was the Security Director at KMCI. Not present was the appointing authority who would be making the ultimate decision on appellant's termination, the KMCI Superintendent. Appellant had been given a draft letter of termination prior to the hearing.

3. Appellant and his attorney were given the opportunity to and did respond to the charges. Appellant's attorney's objection to the absence of the appointing authority at the hearing was, in effect, overruled, and his request to tape the proceedings was denied. Following the hearing, the management representatives who had been present at the hearing consulted with the appointing authority regarding the proposed disciplinary action against appellant. All consulted orally; one also made a written report to the appointing authority.

4. By letter dated July 29, 1987, the appointing authority discharged appellant effective July 30, 1987. The letter cited only three of the six work rule violations set forth in the draft letter of discipline and in the original notice of discharge, but the letter did not explicate why the appointing authority felt discharge was still appropriate in the context of the lesser number of rule violations.

DISCUSSION

Appellant's position is summarized on the first page of his brief in support of his motion for summary judgment as follows:

> The respondent again violated the appellant's right to due process when, following his reinstatement pursuant to the Commission's order in Case No. 85-0217-PC, it discharged the appellant without first providing him an opportunity to respond to the official responsible for his discharge. The absence from appellant's predisciplinary hearing of the official with authority to decide on the appropriate degree of discipline, if any, denied the appellant his right to a "meaningful opportunity to invoke the discretion of the decisionmaker ... before the termination takes effect." Cleveland Board of

> Education v. Loudermill, 470 U.S. 532, 543 (1985). Accordingly, the appellant's termination was invalid as a matter of law.

In support of this proposition, appellant cites language from a number of cases to the effect that predeprivation due process includes a right to be heard by the official who is to make the decision - Arnett v. Kennedy, 416 U.S. 134, 143, 94 S. Ct. 1633 (1974); Thurston v. Dekle, 531 F. 2d 1264, 1273 (5th Cir. 1976); vacated on other other grounds, 438 U.S. 901 (1978); Duchesne v. Williams, 849 F. 2d 1004, 1005 (6th Cir. 1988) (en banc). The difficulty with this authority is that none of these cases involved the issue presented in the instant case - whether a predisciplinary hearing conducted by management representatives, including the employe's direct supervisor, who report back to the appointing authority regarding the results of the hearing, is adequate under the due process clause. The case that comes closest to this issue is Duchesne, but there the Court stated the question as follows:

> " ... Does Cleveland Board of Education v. Loudermill ... require that a discharged municipal employee receive a pretermination hearing before a neutral and impartial decisionmaker rather than before the supervisor who fired him?" 849 F. 2d at 1005.

The Court answered this question in the negative. This opinion cannot fairly be interpreted as supporting the proposition that the appointing authority cannot delegate the hearing process to other members of management.

While the authority cited by appellant is not on point, there is direct contrary authority. In Loudermill v. Cleveland Bd. Education, 844 F. 2d 304 (8th Cir. 1988), which followed the remand by the Supreme Court (Cleveland Bd. Education v. Loudermill, 470 U.S. 532, 84 L. Ed. 2d 494, 105 St. Ct. 1487 (1985)), the Court specifically held that a pretermination

hearing with his supervisor, but not with the person actually authorized to discharge, was constitutionally adequate:

> Loudermill argues, however, that because his meeting was with Roche, his supervisor, but one not with the authority under Ohio law to actually discharge him, his notice and opportunity to respond were not meaningful. He points to the fact that Roche did not convey his remarks to the "ultimate decisionmaker", i.e., the Business Manager and the Board, but instead presented only his conclusions on the matter. Thus, he contends that he was actually terminated by Roche.
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> While Loudermill's argument has a nice ring, such an argument has not been accepted by the courts. Indeed, courts construing the Supreme Court's language in Loudermill have required only the barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place. See, e.g., Buschi v. Kirven, 775 F. 2d 1240, 1256 (4th Cir. 1985); Kelly v. Smith, 764 F. 2d 1412, 1414 (11th Cir. 1985); Brasslett v. Cota, 761 F. 2d 817, 836 (1st Cir. 1985). This court has also decided such questions of procedural due process requiring only the minimum of procedures. See Gurish v. McFaul, 801 F. 2d 225, 227-28 (6th Cir. 1986) (indicating that an interview prior to termination by one not the ultimate decisionmaker is enough to satisfy due process); Lee v. Western Reserve Psychiatric Habilitation Center, 747 F. 2d 1062, 1068-69 (6th Cir. 1984) (all that is required is an "abbreviated opportunity to respond," and, under this standard, a letter informing one of the charges and an interview to explain them is sufficient). See also Deryck v. Akron City School Dist. 633 F. Supp. 1180, 1183 (N.D. Ohio 1986), aff'd without opinion, 820 F. 2d 405 (6th Cir. 1987).
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> While it might be tempting to make this test harder and require that a meeting be with the one actually empowered with the authority to fire, the courts have not construed procedural due process to merit such a requirement. 844 F. 2d at 311-312.

In light of the foregoing, the Commission finds no basis for appellant's contention in his reply brief that the Court "did not expressly consider who must conduct the pretermination hearing."

Laying to one side the specific authority, or lack thereof, underlying appellant's motion, the Commission cannot conclude, based on general principles of due process, that a pretermination hearing before the actual appointing authority as opposed to an agent thereof, is constitutionally mandated. While in Loudermill the Supreme Court referred repeatedly to a pretermination hearing before the "decisionmaker," the case did not present

the issue of whether the ultimate decisionmaker could, consistent with due process, delegate the authority to hold such a hearing to a management agent. Therefore, this holding provides little authority for appellant's position.

Furthermore, the Court in Loudermill stressed the point that the pretermination hearing need not be elaborate and that the procedural requisites could vary depending on the circumstances. The Court also held that the employe's opportunity to present reasons why proposed action should not be taken could be "either in person or in writing," 470 U.S. at 546, 84 L. Ed. 2d at 506. This is inconsistent with an absolute requirement for a face-to-face meeting with the appointing authority. While a meeting with the appointing authority is probably the most efficacious means for an employe to respond to the charges, the due process clause does not require that the pretermination process provide the most efficacious possible hearing. Finally, the conclusion that a direct meeting with the appointing authority as part of the pretermination proceeding is not required by the due process clause is consistent with long-standing principles of administrative law concerning the power of administrative officials to utilize subordinates in a delegated capacity. See, e.g., 2 Am Jur 2d Administrative Law §224; 73 C.J.S. Public Administrative Law and Procedure §56.

ORDER

Appellant's motion for summary judgment on the ground that respondent failed to provide him with the minimum requirements of due process at the pretermination hearing is denied.

Dated: January 12, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr
RCR01/2

DONALD R. MURPHY, Commissioner

GERALD HODDINOTT, Commissioner