STATE OF WISCONSIN PERSONNEL COMMISSION

GEORGE SHOWSH,

Appellant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Respondent.

Case No. 87-0201-PC

INTERIM * DECISION AND ORDER

This matter is before the Commission following the issuance of a proposed decision and order pursuant to §227.46(2), Stats. The Commission has considered the parties' objections to the proposed decision and their arguments with respect thereto, and has consulted with the examiner.

The Commission will adopt the proposed findings with the exception of certain amendments to findings #9 and #10 which are made to more accurately reflect the record.

With regard to the legal aspects of this case, the Commission first addresses the issues related to the predisciplinary proceedings that were held. Respondent contends that the Commission lacks the authority to consider whether a predisciplinary hearing is required by the due process clause. Respondent argues that the Commission lacks the authority to decide constitutional questions, and that to hold that a predisciplinary

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* Pursuant to §227.485, Stats., this is being issued as an interim decision so that the prevailing party will have the opportunity to submit an application for fees and expenses.

hearing is required by the due process clause has the effect of invalidating the civil service code because the code does not provide for a predisciplinary hearing.

While the Commission agrees that it lacks the authority, as an administrative body, to rule on the constitutionality of state statutes, it does not agree that this is what is involved in this case. The civil service code (Subchapter II, Chapter 230, Stats.) neither mandates nor prohibits a predisciplinary hearing. For the Commission to rule on whether due process requires such a hearing is not an attempt to invalidate a statutory provision.

The Commission does not agree that it lacks the authority to address constitutional issues of any kind. The Commission addressed this point at some length in McSweeney v. DOJ & DMRS, 84-0243-PC (3/13/85), as follows:

> This general area has been addressed by the Wisconsin Supreme Court in the specific context of the powers of administrative zoning boards. The Court has held that such bodies do not have the authority to rule on the constitutionality of municipal legislative enactments. See Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 646, 211 N.W. 2d 471 (1973):
>
> > The zoning ordinance of the town of Spider Lake stands as a legislative act of the town. The review boards are administrative agencies which have been created by the same legislative body. Such administrative agencies are clothed with no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which it derives its existence. Therefore, the plaintiffs' remedy in seeking review by such an administrative agency under ordinary circumstances would afford the plaintiffs no relief because it is the plaintiff's contention that the zoning ordinance relied upon by the defendant is unconstitutional as applied to his property.
>
> The Court has distinguished between issues as to the constitutionality of an enactment and issues of a procedural due process nature arising from the application of an enactment. See Master Disposal v. Vil. of Menomonee Falls, 60 Wis. 2d 653, 659, 211 N.W. 2d 477 (1973); Kmiec v. Town of Spider Lake, 60 Wis. 2d at 645:
>
> > In considering the issue of exhaustion of remedies, we would point out that there is a well-defined distinction in applying this judicial policy to the statutory administrative remedies in zoning cases. Such questions as the absence of constitutional due process in the manner in which the administrative agencies

conduct proceedings, and which ordinances to apply, come within the scope of the doctrine of exhaustion of remedies.

See also Nodell Ins. Corp. v. Glendale, 78 Wis. 2d 416, 426, 254 N.W. 2d 310 (1977):

> In Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 645, 211 N.W. 2d 471 (1973), this court recognized as a "well-defined distinction in applying this judicial policy [of exhaustion of remedies] to the statutory administrative remedies in zoning cases.... [A] challenge to the constitutional validity of a zoning ordinance presents a question of law. Such a challenge may properly be made by commencing an action for declaratory judgment and the doctrine of exhaustion of remedies is not applicable. Compare: Master Disposal v. Village of Menomonee Falls [60 Wis. 2d 653, 211 N.S. 2d 477 (1973)]." The reason for this exception is that an appeal to the administrative agency would not have afforded the party adequate relief since the administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which the board derives its existence.
>
> By contrast, in this case the board of appeals does have the power to invalidate the conditions imposed by the plan commission and to afford relief to the property owners without invalidating the ordinance itself. (emphasis supplied)

It seems clear, based on these general principles, and because the Commission's specific enabling statutes do not confer such power, that the Commission lacks the authority to rule on the question of the constitutionality of the statutes relating to the requirement of Wisconsin residency for civil service employment. Presumably the Commission could consider questions concerning alleged constitutional violations emanating from the statutes as applied, the determination of which would not involve reaching any conclusions as to the facial constitutional validity of such statutes, if this case presents such issues.

With respect to the merits of the due process issue, there is a split of authority with regard to the question of whether a suspension without pay involves the kind of deprivation of property that is protected by the due process clause. See, e.g., Carter v. Western Reserve Psychiatric Habilitation Center, 767 F. 2d 270, 272 (n. 1) (Cir. 1985) (two day suspension held de minimis and not protected by due process); Bailey v. Kirk, 777 F. 2d 567, 574-575 (10th Cir. 1985) (four and five day suspensions involve property interest under Fourteenth Amendment); Zannis v. City of Birmingham,

1 IER Cases 796, 798 (N.D. Ala. 1986) (six day suspension covered by Fourteenth Amendment).

The Commission cannot accept the view that a week's salary is not a property interest that is protected by the due process clause. The fact that the deprivation of such an interest is less severe than that involved in a termination of employment should be considered in the context of the question of the nature of the procedural protections that are constitutionally required. See, D'Acquisto v. Washington, 640 F. Supp. 594, 609-610 (N.D. Ill. 1986):

> The argument that a suspension from employment is not a deprivation of the property interest in employment cannot be squared with applicable law. The Supreme Court has described the kind of property interest which the Fourteenth Amendment protects expressly as an interest which secures benefits and supports a claim of entitlement to those benefits. Sindermann, 408 U.S. at 601, 92 S.Ct. at 2699; Roth, 408 U.S. at 576-577, 92 S.Ct. at 2708-2709. The court has also consistently characterized the essential feature of the entitlement as the right to continued benefits, and any interruption in the flow of benefits as a deprivation of the interest. See Atkins v. Parker, 472 U.S. 115, --- and n. 31, 105 S.Ct. 2520, 2529 and n. 31, 86 L.Ed.2d 81 (1985); O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 786-787, 100 S.Ct. 2467, 2475-2476, 65 L.Ed.2d 506 (1980); Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 20, 98 S.Ct. 1554, 1566, 56 L.Ed.2d 30 (1978); Goldberg v. Kelly, 397 U.S. 254, 266, 90 S.Ct. 1011, 1019, 25 L.Fd.2d 287 (1970)....
>
> Suspending officers without pay therefore deprives them of their property interest in the constitutional sense of the term. Indeed, a suspension need not be long-term or indefinite, as the suspensions here are, to trigger the right to fair procedure. A deprivation of constitutional dimensions occurs when the state stops the flow of benefits associated with a protected interest for any appreciable length of time. Memphis Light, 436 U.S. at 20, 98 S.Ct. at 1566; Goss v. Lopez, 419 U.S. 565, 576, 95 S.Ct. 729, 737, 42 L.Ed.2d 725 (1975). The duration of a suspension, since it directly relates to the severity of the deprivation, may be a factor to be weighed when the analysis moves to the third stage of determining what process is due....

However, while the Commission concludes that the five day suspension was subject to the protection of the due process clause and required some kind of pre-deprivation procedure under Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985), it also

concludes the proposed decision errs in its determination that the pre-disciplinary hearing here provided was inadequate. Given the limited nature of the property interest deprivation involved, and the availability of a postdisciplinary trial-type hearing, it is not necessary that the predisciplinary hearing be at all extensive. Appellant was given an opportunity to meet with and explain to his supervisor what he knew about the matters in controversy, after having been advised that disciplinary action might result. While it is possible that this meeting might have been inadequate under Loudermill for a pretermination hearing, it at least ensured that management did not act without knowing appellant's version of the underlying facts. Given the limited nature of the property interest deprivation, and the availability of a full hearing after appellant appealed the suspension, there was no denial of appellant's right to procedural due process in what occurred.

With respect to the degree of discipline, while it should be reduced, the Commission does not agree with the proposed decision that no suspension of any duration is warranted.

In Barden v. UW-System, No. 82-237-PC (6/9/83), the Commission held:

> "In considering the severity of the discipline imposed, the Commission must consider, at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to tend to impair the employer's operation, and the employe's prior record."

The proposed decision failed to give adequate consideration to the first of these factors in the context of respondent's responsibility with regard to the protection of the wholesomeness of the meat supply. In light of the potential danger to the wholesomeness of the meat supply arising from a supervisor's failure to arrange for coverage for a vacationing inspector, such as occurred here, some degree of suspension is warranted in this case

even for one such failure, and the Commission will modify the discipline imposed here to a two day suspension without pay.

ORDER

The proposed decision and order, a copy of which is attached hereto, is adopted as the Commission's final disposition of this matter, with the following amendments:

1. Finding #9 is amended as follows:

June 30, 1987, a Tuesday, was a regularly scheduled slaughter day at one of Mr. Stillings' regularly assigned plants, Otto's Meats. The owner knew Mr. Stillings was going to be on vacation, and he had called Mr. Winemiller ~~early in the morning when no inspector had appeared.~~ the day before to ensure there would be an inspector. Mr. Winemiller said he would send out a relief inspector, and called Warren Wagner to fill in. However, due to a mixup, Mr. Wagner reported to the wrong plant and Otto's proceeded to conduct the slaughter without the presence of an inspector.

2. Finding #10 is amended as follows:

After appellant returned from vacation on July 13, 1987, Mr. Stillings informed him that he wanted to take vacation July 20-24, 1987. Appellant approved the vacation and arranged for Mr. Winemiller to cover Mr. Stillings' regularly-assigned slaughter on July 23, 1987, but failed to make arrangements for coverage of Mr. Stillings' regularly-assigned slaughter at Hujet's Meat on July 20th and at Otto's Meats on July 21st.

3. Conclusions of Law #3 - 5 are deleted and the following conclusions are substituted:

3. Respondent was required to have provided appellant with a predisciplinary hearing adequate under the standards set forth in

Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985), in the context of a five day suspension without pay versus a discharge, and in the context of the availability of a postdisciplinary trial-type hearing.

4. Respondent provided an adequate predisciplinary hearing.

5. Respondent sustained its burden of proof on the merits as to the charge that appellant failed to schedule relief for Inspector Stillings on July 20 and 21, 1987, but failed to sustain its burden as to the other charges.

6. The five day suspension imposed by respondent is excessive in light of the charges actually proven, and under all the circumstances, and should be modified to a two day suspension without pay.

4. So much of the proposed "discussion" as is inconsistent with the foregoing discussion by the Commission is superseded.

5. The following order is entered in lieu of the proposed order:

Respondent's action suspending appellant for five days without pay is modified by changing it to a two day suspension without pay, and this matter is remanded to respondent for action consistent with this decision.

Dated: November 28, 1988 STATE PERSONNEL COMMISSION

AJT:rcr
RCR03/3

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

STATE OF WISCONSIN PERSONNEL COMMISSION

GEORGE SHOWSH,

Appellant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Respondent.

Case No. 87-0201-PC

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of a suspension without pay for five working days.

FINDINGS OF FACT

1. Appellant is a Doctor of Veterinary Medicine (DVM) employed by respondent as a Veterinarian - Supervisor II in the Green Bay regional office. Appellant has been employed by respondent for approximately 16 years.

2. Appellant supervises 8 Meat Inspectors 2 and 3. He reports to the Region Manager, Byron Dennison, who in turn reports to the Food Division Administrator, William D. Mathias. Appellant's immediate supervisor had been Raj Kumrah, DVM, for approximately 8 years until Dr. Kumrah was replaced by Mr. Dennison in April 1987.

3. Appellant's duties and responsibilities as set forth in his official position description (Respondent's Exhibit 19), are summarized in the following position summary:

> Responsible for the supervision, administration & management of all inspection activities in a district. Establish program objectives with subordinates, assist in the training & coaching of employes and evaluate work performance. Review meat plant facilities & operating procedures to determine compliance with laws and regulations. Communicate division policies & regulatory changes to inspection staff & meat plant operators. Responsible for making dispositions of animals and carcasses retained by inspectors because of disease or other abnormalities.

In addition, the foregoing PD contains the following specific activity:

> "B.2 Review applications for leave and schedule relief for inspectors on leave or on special assignments in conjunction with the coordinator [supervisor]."

4. During the period of appellant's supervision by Dr. Kumrah, the unwritten policy in effect when appellant took extended leave (3 or 4 weeks or more) is that appellant and Dr. Kumrah shared the responsibility for scheduling relief inspectors to be at slaughter establishments on slaughter days to replace regularly-scheduled inspectors who were taking scheduled leave. Dr. Kumrah expected appellant to let him know in advance if he had not taken care of or would not be taking care of relief assignments, so that Dr. Kumrah could take care of this.

5. While Dr. Kumrah was still supervising appellant, he approved appellant's vacation for the period June 15, 1987 - July 12, 1987, when appellant was to be in Europe. This vacation subsequently was approved by Mr. Dennison prior to appellant's departure.

6. Sometime during the first week of June 1987, Daniel Stillings, a meat inspector supervised by appellant, asked appellant if he could take vacation the week of June 29 - July 3, 1987. Appellant said that this would be acceptable as long as Byron Dennison and James Winemiller, a Meat Inspector 4 who was not under appellant's supervision but who reported directly to Mr. Dennison, were aware of his plans. Mr. Stillings wrote in his vacation in the central office calendar.

7. The unwritten policy followed in appellant's unit with regard to meat inspectors' vacations was that vacation plans were initially tentatively approved verbally but were subject to change at a later date due to variable circumstances such as weather, farming conditions, etc., and were not considered firm until shortly before the commencement of the scheduled vacation.

8. After the discussion referred to in Finding #6, appellant took no action to schedule relief for the slaughter days to which Mr. Stillings was assigned during the period of his (Stillings') scheduled vacation. Mr. Stillings reminded Mr. Dennison and Mr. Winemiller at least 3 times each of his vacation plans before he left. However, neither took any action to schedule relief inspectors for him.

9. June 30, 1987, a Tuesday, was a regularly scheduled slaughter day at one of Mr. Stillings' regularly assigned plants, Otto's Meats. The owner called Mr. Winemiller early in the morning when no inspector had appeared. Mr. Winemiller said he would send out a relief inspector, and called Warren Wagner to fill in. However, due to a mixup, Mr. Wagner reported to the wrong plant and Otto's proceeded to conduct the slaughter without the presence of an inspector.

10. After appellant returned from vacation on July 13, 1987, Mr. Stillings informed him that he wanted to take vacation July 20-24, 1987. Appellant approved the vacation and assigned Mr. Winemiller to cover Mr. Stillings' regularly-assigned slaughter on July 23, 1987, but failed to make arrangements for coverage of Mr. Stillings' regularly-assigned slaughter at Hujet's Meat on July 20th and at Otto's Meats on July 21st.

11. On July 20, 1987, Hujet's did not call in for a relief inspector and conducted an uninspected slaughter.[1] On July 21, 1987, Otto's did not call in for a relief inspector and conducted an uninspected slaughter.

12. Pursuant to Ag 47.13(3), Wis. Adm. Code, plants are supposed to notify the department if no inspector is present at the time of the plant's regularly-scheduled slaughter. The department routinely sends a relief inspector when this happens.

13. On July 22, 1987, appellant was at Otto's for a routine monthly review. He learned that no inspector had been present on July 21st for the regularly-scheduled slaughter. He also observed a large number of unmarked carcasses in Otto's cooler. He told the owner that all of the carcasses had to be stamped "NOT FOR SALE." Appellant then left the establishment without ensuring that the carcasses were stamped. Appellant never made out a form MID-42, "Processing and Sanitation Report." Subsequently, respondent determined that some of this meat had not been so marked but had been sold illegally by Otto's, as well as some of the meat from the June 30, 1987, slaughter.

14. Otto's Meats had been in operation under the management of the same owner since 1980. During that period, it had a good record of compliance with no major violations of respondent's rules prior to the aforesaid violations. It had been sent a warning letter on July 16, 1987, for having removed a retain tag from and selling some bologna after the retain tag had been placed while a sample was being tested for water content. Appellant was aware of this violation prior to July 22, 1987, but was not aware as of

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[1] These animals slaughtered at Hujet's on July 20, 1987, were identified by the plant as a custom slaughter for which inspection was not required.

July 22, 1987, of the more serious violations referred to in the preceding finding.

15. Respondent had no formal policy, either written or unwritten, specifically requiring that under the circumstances that existed on July 22nd at Otto's, appellant was required to have remained on the premises to physically ensure that his instructions to stamp the carcasses were followed. Appellant's actions in not doing so presumably would not have been considered improper by his former supervisor, Dr. Kumrah, and neither Mr. Dennison nor other management had advised appellant before this incident of any requirement that he physically ensure the stamping of carcasses under such circumstances.

16. A "policy memorandum" entitled "Policy No. 49" issued September 17, 1980, Respondent's Exhibit 18, instructed each supervisor during each plant visit to complete an MID-42 as follows:

> "2. Complete a MID-42 to record the condition of the plant. Discuss the deficiencies with plant management and have them sign the MID-42 when:
>
> a) Unacceptable deficiencies are observed in any of the seven basic review categories, or
>
> b) The inspector is not present."

17. The foregoing policy was not strictly enforced during Dr. Kumrah's tenure as supervisor over appellant. As far as Dr. Kumrah was concerned, it was discretionary with the supervisor whether to fill out an MID-42 when unstamped meat was found in a plant, and this rested in substantial part on the plant's prior record of compliance. Prior to this incident on July 22nd, neither Mr. Dennison nor other management ever advised appellant that Policy No. 49 was going to be strictly enforced or that Dr. Kumrah's approach to this issue was in conflict with management's approach.

18. Subsequent to these events, respondent received a consumer complaint about some meat processed at Otto's, and conducted an investigation. By memo dated August 6, 1987, from Doye Card, Compliance Officer, to Gary L. Bauer, Director of Compliance, Mr. Card reported that the investigation revealed that on the slaughter days that Mr. Stillings had been on vacation, no inspector was present, that Otto's conducted uninspected slaughter, and that some of this meat had been sold illegally.

19. In a memo dated August 12, 1987, from Mr. Mathias to, among others, appellant, Respondent's Exhibit 3, Mr. Mathias stated as follows:

> Subject: Compliance Report on Otto's Meats
>
> I have just finished reading Doye Card's compliance report on Otto's Meats in Luxemburg. The report indicates that Otto Knocke slaughtered and sold uninspected meat. The dates involved were June 29 and July 21, 1987. Supposedly no inspector was present on these slaughter dates.
>
> Would each of you please write me a letter telling me everything that you know about this situation.

20. In response to this memo, Mr. Winemiller responded by memo dated August 17, 1987, Respondent's Exhibit 6, which included the following: " ... As for the 21st of July, I know nothing about it except that there were no calls to this office for an inspection...."

21. Sometime in October 1987, Mr. Dennison met with appellant. He told appellant that there was a possibility that disciplinary action would ensue, although he did not state specifically that appellant was the target of the possible discipline. Mr. Dennison told appellant that it was a meeting to gather as much information as possible, and asked him what he had to say about his involvement in the incidents or "situations around the June 29th and July missed inspections." He did not advise appellant he had a right to be represented at said meeting.

22. Subsequently, by letter dated November 11, 1987, Respondent's Exhibit 16, respondent notified appellant of his suspension without pay for 5 days from November 16-20, 1987, for the following reasons:

> This action is being taken for violation of Department Work Rule #1 "Disobedience, insubordination, negligence or refusal to carry out written or oral instructions or assignments."
>
> While employed as a supervisor of Meat Inspectors in the Green Bay Region of the Food Division you failed to provide slaughter coverage for an inspector while he was on vacation. During the weeks of June 29 and July 20, 1987, you did not assign inspectors to cover the slaughter assignments of Mr. Daniel Stillings. You also failed to take corrective action and complete the necessary reports when you observed beef carcasses not stamped for identification at Otto's meats and you did not have the meat plant operator correct the violations by having him or her identify the meat as not for sale.
>
> These are very serious violations of the wholesome meat act which have had a diminishing affect on the department's Meat Inspection program and caused significant problems for the meat plant operator(s) involved. Your behavior in these matters has been a direct violation of your position description and program directives and procedures.

23. During Dr. Kumrah's tenure as appellant's supervisor, there had been a number of occasions where supervisors under Dr. Kumrah's supervision had failed to arrange relief for slaughters when meat inspectors were on vacation. Dr. Kumrah had never recommended disciplinary action with respect to these incidents.

24. Appellant had no prior disciplinary record with respondent at the time this suspension was imposed.

25. At the time of the hearing of this matter, Dr. Kumrah had pending before this commission an appeal and a charge of discrimination under the Fair Employment Act that named Mr. Mathias. Both these matters involved transactions that were unrelated to appellant's suspension. Dr. Kumrah also had some policy disagreements with Mr. Mathias's operation of the meat inspection program.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden of proof.

3. Respondent was required to have provided appellant with a pre-disciplinary hearing sufficient under the standards set forth in Cleveland Bd. of Education v. Londermill, 470 U.S. 532, 105, S.Ct. 1487, 84 L. Ed. 2d 494 (1985).

4. Respondent failed to provide an adequate predisciplinary hearing.

5. This disciplinary action is defective and must be rejected.

DISCUSSION

The first issue to be addressed is the adequacy of the pretermination hearing. In McCready & Paul v. DHSS, Nos. 85-0216-PC, 85-0217-PC (5/28/87), the Commission, in its discussion of the requirements of such a hearing, cited Cleveland Bd. of Education v. Londermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L. Ed. 2d 494 (1985) as follows:

> ... the pretermination 'hearing,' though necessary, need not be elaborate. We have pointed out '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of subsequent proceedings.'... In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action.... Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.
>
> ... Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action....
>
> The essential requirements of due process, and all that respondents seek or the court of appeals required, are notice and an opportunity to respond.
>
> The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due

> process requirement.... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.... 84 L.Ed. 2d at 506.

The record in the instant case does not support a conclusion that appellant was given an adequate pretermination hearing. Appellant adamantly denied having received any pretermination hearing per se or having any indication from management that disciplinary action was being contemplated. Mr. Dennison testified that he did have a meeting with appellant, but this was more of an investigative interview than a pretermination hearing, and it did not include all the elements required under Cleveland Bd. of Education v. Londermill, supra. This is illustrated by the following excerpts from Mr. Dennison's testimony:

[Direct]

Q: Were you involved at all in collecting information, and providing information, to Mr. Mathias concerning the events involving Dr. Showsh?

A: Yes, I was.

Q: And, do you recall ever conducting a predisciplinary conference with Dr. Showsh?

A: Yes.

Q: And, do you recall approximately when that occurred?

A: I'm not sure exactly what day that it was, but I remember specifically holding the meeting in the small conference room here in the Green Bay office.

Q: Do you recall approximately what month you may have done that?

A: October?

Q: What year?

A: '87.

Q: Did you advise Dr. Showsh at that point in time that discipline might be taken?

A: Yes. I told him that there was a possible chance that disciplinary action would come out of this meeting or investigation or fact-finding.

Q: And then you also asked him to tell you what had happened?

A: Right.

Q: And the information you collected, what did you do with that?

A: Well, I took it to the central office and met with Bill Mathias.

* * *

[Cross]

Q: Now, in October you had a predisciplinary meeting with Dr. Showsh, is that correct?

A: Yes.

Q: Did you send him a memo saying this would be a predisciplinary meeting?

A: No.

Q: Did you inform him he had a right to be represented at such a meeting?

A: To the best of my knowledge, no.

* * *

Q: Now did you tell George, or Dr. Showsh, what he was being, why he was being considered for discipline?

A: I tried to inform George of, that it was an investi -- , that it was a meeting to gather as much information as possible, and asked him to tell what he had to say about the, his involvement in the incidents.

Q: And which incidents are you referring to?

A: The situations around the June 29th and July missed inspection.

On this record, appellant had no notice of the "proposed action" against him being contemplated by management. In fact, given that during this period management was considering disciplining a meat inspector for having failed to cover slaughter on one or more of the occasions in question, the mere fact that Mr. Dennison said that "there was a possible

chance that disciplinary action would come out of this meeting or investigation or fact-finding" might well not have alerted appellant that any disciplinary action was being considered against him. The fact that appellant was not told he had the right to be represented, while probably not a due process violation itself, is a factor that is inconsistent with respondent's theory that this was a predisciplinary hearing and appellant was or should have been aware disciplinary action against him was being contemplated.

There is nothing in Mr. Dennison's testimony that would support a finding that he gave notice of any charges against appellant, or "an explanation of the employer's evidence." In response to the question of whether he told appellant why he was being considered for discipline, Mr. Dennison only stated:

> "I tried to inform George of, that it was an investi -- , that it was a meeting to gather as much information as possible, and asked him to tell what he had to say about the, about his involvement in the incidents."

It should be noted that while the Commission sees no reason why the employer's burden of proof in disciplinary proceedings should not extend to the adequacy of the pretermination hearing, it would make the same findings regardless of the allocation of the burden of proof.

Although the absence of a constitutionally adequate pretermination hearing fatally undermines the disciplinary action, since there was a plenary hearing and this decision is being issued on a proposed basis pursuant to §227.46(2), Stats., the Commission will address the merits of the suspension imposed to avoid the possibility of a remand to consider that part of the appeal in the event that the aforesaid conclusion should be overturned at any point.

The general framework for analysis of just cause for disciplinary is provided by Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974):

> "'... one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works....'"

The first charge against appellant is that he failed to arrange for Mr. Stillings' relief for his assigned slaughter days the week of June 29, 1987. Appellant does not deny this, but alleges that this should have been taken care of by his supervisor since appellant was on vacation June 15 - July 12, 1987. Respondent's rejoinder is that appellant should either have taken care of this before leaving on vacation or specifically requested his immediate supervisor, Mr. Dennison, to have done so.

There was no written policy, rule, etc., governing how relief scheduling for meat inspectors was to be handled when a supervisor like appellant was to be on extended vacation. Mr. Dennison testified that it was the responsibility of the supervisor, but he did not explain how he reached this conclusion. Appellant's theory that it was his supervisor's responsibility was based on what he characterized as a long-standing practice under Dr. Kumrah. Dr. Kumrah's testimony tended to support appellant's theory.

Before looking at Dr. Kumrah's testimony, it is necessary to address an evidentiary ruling that was made at the hearing. Respondent attempted to introduce evidence concerning both certain administrative proceedings Dr. Kumrah initiated against the department (an appeal of a layoff transaction and a related discrimination complaint), and certain policy disagreements Dr. Kumrah had with the current administration. Appellant objected to this evidence, and the objections were sustained. Respondent

pursued an offer of proof which was the subject of redirect. Because in retrospect these rulings were erroneous, they are rescinded as part of the proposed decision. Such evidence is an appropriate factor to be considered in evaluating credibility:

> "On cross-examination to show bias, prejudice, or hostility, including cross-examination of a witness who denies any such feeling, it is the party's right to inquire as to the existence of any fact which in the light of human experience might reasonably engender hostility toward the party, or affect the witness with partisan feeling, and thus impair the trustworthiness of his testimony. Under this rule, it is proper to inquire of the witness as to ... actions past or pending between the witness ... and the party...." 81 Am Jur 2d Witnesses §561.

While Dr. Kumrah's litigation against his employer and his policy disagreements should be taken into consideration in evaluating his credibility, these factors do not weigh heavily, because they are essentially unrelated to the matters involved in this appeal, and Dr. Kumrah's testimony about what his practices and expectations were when he was a supervisor over appellant were not substantially contradicted.

Dr. Kumrah testified that when a supervisor went on extended vacation, he (Dr. Kumrah) was responsible for providing relief for the supervisor's inspectors who went on vacation, but that the supervisor had some responsibility to inform him of the situation:

> [Direct]
>
> Q: Now, in the eight years that you were the regional coordinator for the meat program, can you tell me what the policy was, and the procedures were, about scheduling vacations, both in the sense of what happened when a supervisor went on vacation, and in the sense of what happens when an inspector goes on vacation?
>
> A: Well, we'll start with the inspector first, you know, it is the responsibility of the supervisor to schedule and take care of their assignment fully, unless they need help from me, if they're short of some help, and then I may come in and replace their people if they want as far as the supervisors are concerned they are, that was my responsibility to let them have the vacation, you know, leave, and normally, I don't know in which area you want to know, that we never had something written procedure to

> follow, you know, that if a supervisor wants to go on vacation, an extended vacation, that he will let me know that he plans to go from 3-4 weeks and so and so month, and then, just going before, a couple of weeks or a week time, when exact dates are known to me, and then we sit down and discuss about that, you know, that everything is covered, that you need any help somewhere, and the supervisor will let me know that all the assignments are covered, or that some of his inspectors are on vacation and he needed help in a particular area, you know, to cover the kill floor, and then I'll try to schedule those things you know, but if I give him a vacation time, that's all my responsibility after that to cover his area and his plants.

[Cross]

Q: So if, for example, Dr. Showsh was going on vacation while you were his supervisor, and Dr. Showsh knew that one of his employes was going on vacation prior to his leaving, you would expect him to find relief for that particular employe before he would leave for his vacation, wouldn't you?

A: Not that far, I could do that if I know that the person is already, he has approved his vacation and is, the time he's going, and the time the other fellow want to go is about 3 or 4 weeks, I don't think he has to do that.

Q: But you would expect him, if he wasn't going to do that to tell you about that?

A: Yes.

While appellant did not approach Mr. Dennison before he left on vacation and specifically ask him to arrange coverage for Mr. Stillings, the latter testified that appellant specifically told him to ensure that Mr. Dennison and Mr. Winemiller were aware of his vacation. Mr. Stillings also testified that this instruction was tied in to the practice in appellant's unit that the meat inspectors' vacations were initially scheduled tentatively and were not considered definite until shortly before the event. He further testified that he reminded Mr. Dennison and Mr. Winemiller at least three times each with regard to his vacation plans. Mr. Stillings appeared to be a credible witness, and, since his leave had been approved in advance on both occasions, he was essentially disinterested. While his testimony in this regard was largely favorable to

his immediate supervisor, this is counterbalanced to some extent by the fact that it was unfavorable to higher levels of management.

In conclusion on this point, appellant took action to see that both Mr. Dennison and Mr. Winemiller were aware of Mr. Stillings' vacation during his absence. Based on past practice, appellant could assume that management would take care of relief coverage for Mr. Stillings in appellant's absence. No one had ever told him that there had been a change in past practice. The only arguable deviation from the practice testified to by Dr. Kumrah is that appellant did not go to Mr. Dennison directly but rather instructed Mr. Stillings to do so. However, little significance can be attached to this since appellant was leaving on vacation two weeks before Mr. Stillings, and, as testified by both appellant and Mr. Stillings, the inspectors' vacation plans were considered tentative until shortly before the event. Furthermore, based on Dr. Kumrah's testimony, the practice followed in this area was relatively informal.

The second allegation against appellant is more straightforward, inasmuch as it involves a charge that appellant failed to schedule relief for Mr. Stillings in July when the appellant was not on vacation. Appellant claims he did assign Mr. Wagner to cover on the days in question, while respondent contests this assertion. Both Mr. Winemiller and appellant testified that Mr. Wagner was given this assignment, while Mr. Wagner denies it.

On reviewing the record relating to this issue, the Commission concludes that a preponderance of the evidence supports a finding that appellant did not assign Mr. Wagner to cover for Mr. Stillings on the dates in question.

Obviously, both Mr. Wagner and appellant have an interest with regard to this matter, since either could have been involved in a dereliction of duty depending on which version of the facts were accepted. While Mr. Winemiller was nominally a disinterested third party, he admitted to being a friend of the appellant. Furthermore, Mr. Winemiller's account was weakened by certain conflicts between his testimony and previous statements.

The record reflects that on March 29, 1988, after the discipline had been imposed, but before the hearing on this appeal, Mr. Winemiller gave a statement to respondent's attorney in which he said that appellant gave his instructions to Mr. Wagner in the presence of him (Winemiller) and another inspector in appellant's unit, Rosemary Runge. The record further reflects that on April 5, 1988, appellant called Ms. Runge to inform her that she would be interviewed that date by respondent's attorney. When she inquired about the purpose of the interview, appellant informed her (in her words) it was about Ms. Runge "being present at a meeting where Warren Wagner was told to report somewhere to fill in for Dan Stillings." Ms. Runge has never acceded to and has denied ever having been at such a meeting. Subsequently, Mr. Winemiller at first testified at the hearing that no one was present when appellant gave Wagner his assignments besides the three of them (Showsh, Wagner, and Winemiller). When the March 29, 1988, statement was brought up on cross-examination by respondent's counsel, he (Winemiller) said Ms. Runge might have been there. Also, when Mr. Winemiller responded to Mr. Mathias's August 12, 1987, memo, which stated that it had been reported that Otto's Meats had slaughtered and sold uninspected meat and that supposedly no inspector had been present on the slaughter dates of June 29 and July 21, 1987, and asked for "everything

that you know about this situation," Mr. Winemiller reported: " ... As for the 21st of July, I know nothing about it except that there were no calls to this office for an inspection...."

Finally, Mr. Wagner produced his activity report, which appellant had signed, that reflected that he (Mr. Wagner) had not been in the Green Bay office the week when the meeting allegedly occurred.

The third incident involved appellant's activity on July 22, 1987, at Otto's Meats, when he failed to ensure that the carcasses in question were stamped, and failed to file a report concerning what he encountered there. Much of respondent's approach concerning culpability with respect to this situation involved the theory that appellant's actions were inimical to the general goals of the meat inspection program. However, an employe, even a supervisor, cannot be held accountable from a disciplinary standpoint for the failure of the agency to completely achieve its program goals if that employe's actions are within a range of action that has been established as acceptable by that employe's supervisor.

In this case, appellant testified that it was discretionary with a supervisor whether to physically ensure that an operator complies with instructions to stamp carcasses, and that it was reasonable not to have done so in this case under the circumstances because Otto's had had a long, basically positive record of compliance. Appellant had some awareness during his vacation that Otto's had been cited for selling some bologna that had been tagged with a retain tag while a sample was being tested for possible excess water content. However, the record does not establish that this was considered a serious violation, and it resulted only in the issuance of a July 16, 1987, warning letter. Mr. Card's August 18, 1987,

inspection report, Respondent's Exhibit R-13, confirms that there was no record of noncompliance with Otto's prior to that.

Appellant also testified that he had been instructed not to comply strictly with Policy No. 49 governing completion of MID-42's, that it was discretionary with the supervisor whether to fill one out, and that, again, it was reasonable not to have filled one out in this case.

Dr. Kumrah, who had supervised appellant until a few months before this incident, essentially confirmed appellant's contentions. There was testimony from other witnesses that the preferable or proper approach was to physically ensure that carcasses were stamped. However, this was not a written policy of the department, and the key factor in a disciplinary matter of this kind is what the employe's supervisor considers to be acceptable. Again, there was no indication that Mr. Dennison ever had communicated a change in policy to appellant after he took over from Dr. Kumrah as supervisor. Therefore, the Commission must conclude that appellant's actions on July 22, 1987, were within the range of standards communicated to him by management, and his actions could not be considered to constitute "just cause" for discipline.

Continuing to address the merits of this case, the only specification against appellant that was sustained was that he failed to arrange for relief coverage for Mr. Stillings on July 20 and 21, 1987. Based on this finding and other matters of record, the Commission would modify the five day suspension to a written reprimand. It is usually a difficult task to determine appropriate modification of disciplinary actions in cases such as this, due to the relatively wide range of discretion vested in management in determining the degree of discipline and the difficulty of comparing cases, both as to severity and collateral circumstances, that may affect

disciplinary decisions.[2] In this case, the fact that respondent was able to sustain its burden of proof only as to a limited part of the specification of charges presumably should lead to a considerable reduction in the penalty. The fact that under Dr. Kumrah, this kind of problem (failure to arrange for relief of a vacationing inspector) never resulted in a recommendation for discipline weighs against the imposition of discipline here. On the other hand, there definitely was a failure on appellant's part to discharge an acknowledged responsibility, and management should not be estopped from imposing any discipline for such an infraction solely because of the approach to disciplinary action taken by a prior supervisor under circumstances that may or may not be comparable to what occurred here. The absence of any prior disciplinary record for appellant is a factor weighing against undue severity in discipline, and therefore a written reprimand appears to be the most appropriate modification of the discipline.

To reiterate, the foregoing determination is being made on a contingency basis only, and the entire disciplinary action must be rejected because of the due process considerations discussed above. Respondent is required to rescind its disciplinary action and restore appellant's salary and benefits for the five working days in question.

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[2] The limited information about the Milwaukee region cases referred to by both parties make them of limited use here.

ORDER

Respondent's action suspending appellant without pay is rejected and this matter is remanded for action in accordance with this decision.

Dated: _____, 1988 STATE PERSONNEL COMMISSION

AJT:rcr
~~SHG/2~~
RCR03/2

_____
DONALD R. MURPHY, Commissioner

_____
LAURIE R. McCALLUM, Commissioner

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