STATE OF WISCONSIN PERSONNEL COMMISSION

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ROBERT H. LETZING,

Appellant,

v.

Secretary, DEPARTMENT OF DEVELOPMENT,

Respondent.

Case No. 88-0036-PC

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DECISION AND ORDER ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of a suspension without pay for 10 days. This matter is before the Commission on appellant's motion for summary judgment on the ground that respondent failed to provide him with the minimum requirements of due process in connection with the presuspension procedures that were followed. The parties have filed briefs and affidavits. The Commission concludes that the following material facts are not in dispute. These findings are limited to the purpose of resolving this motion.

FINDINGS OF FACT

1. Appellant has been employed at all relevant times by respondent in the classified civil service as an international commerce consultant in the Bureau of International Development.

2. On February 17, 1988, appellant was summoned to a meeting with Rolf Wegenke, administrator of the Division of Economic Development and appellant's second-line supervisor. Appellant was not told in advance the purpose of the meeting.

3. In addition to appellant and Wegenke, Helen McCain, administrator of the Division of Administrative Services, which includes the personnel function, was also present at the meeting. When appellant arrived and saw McCain there, he asked Wegenke if he needed a lawyer. Wegenke replied that he did not. Wegenke then stated as follows, or words to this effect:

> " ... I immediately said that there had been concerns expressed about the District Export Council meeting, and I said now I had received this letter which also raised very serious questions, and I wanted to talk and find out his version, his version of the facts." (Wegenke Deposition, p. 30)

4. Wegenke proceeded to express various concerns about certain alleged conduct of appellant in connection with the aforesaid matters, and appellant responded.

5. Wegenke at no time prior to or during the course of this meeting told appellant that management was considering discipline as a result of the matters that were discussed at the meeting.

6. On February 19, 1988, appellant was summoned to another meeting with Wegenke and McCain where he was given a letter imposing a ten-day suspension without pay.

7. Appellant appealed this suspension to this Commission pursuant to §230.44(1)(c), Stats.

DISCUSSION

The first issue that must be resolved on this motion is whether a suspension without pay involves a deprivation of property that is protected by the due process clause. The Commission addressed an almost identical issue in Showsh v. DATCP, Wis. Pers. Commn. No. 87-0201-PC (11/28/88), which involved a five-day suspension, as follows:

> 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 that than 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, -- 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)....
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> 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 an 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....

... 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)....

The next issue that must be addressed is the nature of the predisciplinary proceeding required. In Showsh, the Commission went on to discuss this aspect of the case as follows:

> ... 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.

In the instant case, appellant was not told in advance, or at the outset, of the February 17, 1988, meeting that discipline might result. The parties disagree as to whether McCain told appellant at the conclusion of the meeting that what occurred at the meeting would be taken into consideration with respect to disciplinary action. However, since in the Commission's opinion appellant's due process challenge falls short even if this factual aspect of the case is resolved in his favor, it will assume for the purpose of deciding this motion that McCain made no such representation.

Even though for purposes of deciding this motion, the Commission concludes that at no time prior to the imposition of the suspension did management explicitly inform appellant that there was a potential for disciplinary action, it does not follow that there was a failure of due process. In Showsh, the Commission noted that the employer had advised the employe of the potential for discipline, but it did not hold that such notice was absolutely required by due process in a suspension case. Indeed, the procedural requirements of due process are flexible and will

vary depending on the facts and circumstances of each case. Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 895, 6 L.Ed.2d 1230, 1236, 81 S.Ct. 1743, 1748 (1961).

In the instant case, while appellant was not advised explicitly that he could be disciplined, he was called into a meeting with his second-level supervisor who informed him of a number of concerns he had about certain of appellant's actions, and asked appellant for his version of the events. Even assuming, which the Commission will do for the purpose of deciding this motion, that appellant would have taken a different approach had he known that disciplinary action was being contemplated, he was given an opportunity to give his side of the story to respondent. While it would have been preferable for respondent to have explicitly advised appellant at the outset that disciplinary action was being considered, it must be remembered that the requirements for predisciplinary procedures are a good deal less for a ten-day suspension than for a discharge.

This conclusion is not altered by the interchange that occurred at the outset of the February 17th meeting, wherein appellant asked Wegenke if he needed a lawyer, and Wegenke replied that he did not, although it makes it a far closer case. Appellant contends it makes this appeal comparable to McCready & Paul v. DHSS, Nos. 85-0216-PC, 85-0217-PC (5/28/87), where the employer first advised the employe prior to the predisciplinary hearing that the most serious discipline that would result would be a reprimand, and then imposed a discharge. In that case, the Commission concluded that the misinformation about the potential degree of disciplinary action constituted a substantial defect in the predisciplinary procedures that followed. However, here appellant was not told that no discipline, or only minimal discipline, was possible. Rather, in response to his question, he

was told that it was not necessary for him to have an attorney. While appellant may have interpreted this as an indication that no significant disciplinary action would be forthcoming, it is also the case that Wegenke's remark could have been a reference either to an opinion that no attorney was necessary regardless of the potential discipline,[1] or to some other opinion regarding the role of attorneys in matters of that nature. In any event, while in the Commission's view Wegenke's response to appellant's question was open to different interpretations and was not ideal as a matter of personnel management, it is not prepared to hold under all the circumstances that from an objective standpoint (i.e., how a reasonably prudent employe similarly situated to the appellant would have reacted), it was so misleading as to rise to the level of a violation of due process, such as occurred in Paul.

Appellant also argues that respondent's failure to have provided explicit notice of the possibility of disciplinary action deprived him of the opportunity to attempt to persuade management not to impose discipline, or to impose less discipline. The Court in Loudermill discussed the significance of such an opportunity as follows:

> " ... Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect...." 470 U.S. at 543, 84 L.Ed.2d at 504-505.

While the Commission will assume that appellant would have had more of an "opportunity to invoke the discretion of the decisionmaker" if he had had

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[1] This is consistent with the concept espoused in some decisions that an employe is not entitled to representation by counsel in a predisciplinary proceeding as a matter of constitutional due process. Buschi v. Kirven, 775 F.2d 1240, 1255-6 (4th Cir., 1985).

explicit notice that discipline were possible, the fact remains that he had some opportunity to address respondent's concerns about his actions. While he may not have been aware that discipline per se was being considered, it is reasonable to assume, again using an objective test, that a relatively high-level employe like appellant, faced with such concerns by management about his actions, would make a good effort to put himself in the best possible light and to advance whatever mitigating or extenuating circumstances might be available, albeit perhaps not to the extent that would have occurred in an explicit predisciplinary context. Also, this aspect of the predisciplinary proceeding again must be evaluated in light of the lesser impairment to the employe's interest of a ten-day suspension as opposed to a discharge. The importance of engaging management's discretion regarding discipline is less in the former case, and the opportunity to do so accordingly does not need to be as elaborate.

In conclusion, while in the Commission's opinion it definitely would have been preferable for management to have told appellant from the outset that formal discipline was a possibility, the requirements of due process are minimal in a case involving a suspension with the right to a trial-type hearing on an appeal. In most cases, including this one, the key requirement is that the employer not act without first giving the employe an opportunity to present his version of the facts, and that did occur here.

ORDER

Appellant's motion for summary judgment on the ground that the prediscipliinary procedure was inadequate is denied.

Dated: Jan 25, 1989 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Commissioner

GERALD HODDINOTT, Commissioner

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