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GEORGE SHOWSH, D.V.M.,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION,

Respondent.

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DECISION

Case No. 89-CV-445

DECISION

On November 11, 1987, Petitioner, George Showsh, D.V.M. (Dr. Showsh) was suspended from his position as a Veterinarian/Supervisor II for a period of five days without pay by the respondent, the Department of Agriculture, Trade and Consumer Protection (DATCP). Pursuant to §230.44(1) (c), Wis Stats., Dr. Showsh appealed the five-day suspension on the grounds that the suspension was without just cause and he had been denied due process. The hearing examiner issued Proposed Decision and Order finding that Dr. Showsh had been denied due process.

The State of Wisconsin Personnel Commission issued an Interim Decision and Order in which it adopted, with only minor modification not relevant to the issue of due process, the hearing examiner's proposed findings of fact. The Commission, however, rejected the hearing examiner's proposed conclusions of law with regard to the issues of due process and just cause. The Commission found that the petitioner had been afforded due process and that just cause was established for at least one of the charges. The Commission reduced the five-day suspension to a two-day suspension.

On December 21, 1988, Dr. Showsh filed a petition for attorney's fees and costs on the grounds that he was the prevailing party within the meaning of §227.485(3), Wis. Stats. On January 26, 1989, the Commission denied the petition for attorney's fees and costs on the grounds that the DATCP had been substantially justified in imposing a five-day suspension and because Dr. Showsh had not submitted an affidavit of eligibility with the petition. The Commission also denied Dr. Showsh's petition for rehearing on March 14, 1989. Pursuant to §227.53, Wis. Stats., Dr. Showsh filed a petition for judicial review in this court. Briefs were filed by both sides.

This court adopts the Findings of Fact filed by the hearing examiner and adopted by the Commission with minor changes.

On June 30, 1987 and July 20 and 21, 1987 Otto's Meats slaughtered animals without a meat inspector present (Findings Nos. 9 & 10). After the slaughters, respondent received a consumer complaint about some meat processed at Otto's, and conducted an investigation. The result of the investigation was reported in a memo dated August 6, 1987. It revealed that no inspector was present at Otto's on the dates in question and that some of the meat slaughtered on those days had been sold illegally. (Finding No. 18). On August 12, 1987 a memo was sent from the respondent's employee Mr. Mathias to among others the appellant. It 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." (Finding No. 19)

The hearing examiner found in Finding No. 21 as follows:

"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."

The appellant was notified of his suspension by a letter dated November 11, 1987. The suspension was for 5 days without pay. That letter stated with specificity the violations and that they were contrary to Department Work Rule #1. (Finding No. 22). Appellant had no prior disciplinary record with respondent at the time this suspension was imposed (Finding No. 24). The suspension took place more than three months after the violations. Dr. Showsh appealed the suspension and received a full hearing before the hearing examiner which is the subject of this review on April 19, and 20 and May 6, 1989.

The issues of whether Dr. Showsh was denied due process and whether he was entitled to recover fees and costs under §227.485, Wis Stats., are questions of law which may be reviewed ab initio by this court. Boynton Cab Company v. Department of Industry, Labor and Human Relations, 96 Wis 2d 396, 291 N.W. 2d 850, 855

(1980). In this case the court's competence to decide a constitutional issue is clear and no special deference is owed to the administrative agency. Id. 291 N.W. 2d at 855. The question of due process can, as the Commission argues, involve factual disputes. In this case, however, everyone accepts the same facts as they relate to the question of the sufficiency of the predisciplinary hearing. No facts are in dispute.

The United States Supreme Court case of Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 503 (1985) controls this review. It holds that the due process issues must be decided with reference to federal rather than state law.

"We pointed out that the minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the state may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."

The Loudermill case sets forth the essential elements of due process required in predisciplinary hearings.

"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." Id. at 506

While the Loudermill case requires something less than a full evidentiary hearing in a predisciplinary hearing, it does require the basic requirement of notice of the charges against the employee. No such notice was given to Dr. Showsh. Neither the

memo requesting information on the events in June and July nor the supervisor in the meeting with Dr. Showsh gave any notice of any charges pending against Dr. Showsh. He was informed only that "there was a possibility that disciplinary action would ensue," although he [Mr. Dennison] 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..." (Finding No. 21). While he had an opportunity to tell Mr. Dennison what he knew about the "situations around the June 29th and July missed inspections," he did not have any idea that there were charges being considered against him or what they were, nor was he given any explanation of the employer's evidence. At no time was he informed that this was a predisciplinary hearing or that he had a right to an attorney.

Based on these facts the hearing examiner correctly concluded that the petitioner was denied due process. Dr. Showsh did not receive notice of the charges against him, therefore he was deprived of any meaningful opportunity to respond to the charges prior to his suspension. The Commission agreed that imposing a five day suspension without pay "was subject to the protection of the due process clause." Likewise a two-day suspension imposed without pay constitutes a deprivation of property entitled to a due-process protection.

There is an exception to the requirement that a predisciplinary hearing meet the basic requirements of due process and that is when necessity requires quick action by the state or

when it is impractical to provide any meaningful predisciplinary hearing. Lee v. Western Reserve Psychiatric Rehabilitation Center 747 F. 2d 1062, 1068 (6th Cir. 1984). Only in those situations is a postdisciplinary hearing adequate. Those exceptions do not apply in this case. Any argument that quick action required the absence of a hearing prior to suspension fails because the suspension did not occur until more than three months after the alleged violations. By the agency's slowness to act to discipline, it is clear that there was no need for quick action to preserve the quality of the state's meat supply.

Because I am reversing the Commission on the grounds that the petitioner was denied due process, I will not discuss in great detail his argument that the Commission's findings of fact regarding whether Dr. Wagren was told to cover Dan Stillings' shift on July 21, 1987. I am finding, however, that the issue is one of credibility and there is substantial evidence to support the Commission's finding.

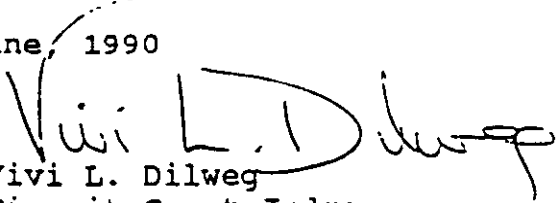
The entire disciplinary action must be rejected because of the failure to provide Dr. Showsh basic due-process rights in violation of the 14th Amendment. The disciplinary action of the Commission must be reversed and the appellant's salary and benefits restored for the two working days in question. The question of costs and attorney fees must be re-examined in light of my finding that Dr. Showsh was denied due process and that the Commission's order is now rescinded.

ORDER

The Commission's action in suspending Dr. Showsh without pay is reversed and their order rescinded. This matter is remanded for action in accordance with this decision.

Counsel for the petitioner shall prepare an order in accordance with this decision and present it to the court for approval and signature.

Dated this 29<sup>th</sup> day of June, 1990

  
Vivi L. Dilweg  
Circuit Court Judge

VLD/sew

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