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ALIEU FOFANA,
 Appellant,
 v.
 Secretary, DEPARTMENT OF HEALTH
 AND SOCIAL SERVICES,
 Respondent.
 Case No. 90-0120-PC

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RULING ON
 PETITION FOR
 REHEARING AND
 FINAL ORDER

This matter is before the commission on respondent's petition for re-hearing filed on July 18, 1991. Appellant filed a reply on August 5, 1991.

The first ground for the petition is as follows:

1. The commission found that the Appellant engaged in misconduct and that there was just cause for imposition of discipline.
2. The commission, however, concluded that the Respondent may impose no more than a verbal counseling.
3. Verbal counseling is not a form of employee discipline. The decision should be modified to permit imposition of formal discipline. See s. 230.80(2), Stats.

Section 230.80(2), stats., defines "disciplinary action" in the context of subchapter III of chapter 230, stats., "EMPLOYEE PROTECTION". Regardless of whether verbal counseling falls within this definition, which in addition to the enumerated actions, has an "including but not limited to" clause, this definition of disciplinary action is not conclusive with respect to either the definition of disciplinary action under subchapter II of Chapter 230, stats., or the commission's remedial authority in a s. 230.44(1)(c), stats., appeal. Furthermore, as appellant notes, respondent's own policy of employe discipline, Appellant's Exhibit 1, at s. 264.1 C, "Progressive Discipline," specifically provides that: "[v]erbal Warning (or oral reprimand) is the first step in a progressive disciplinary system." Therefore, the commission does not perceive any error in this aspect of the decision.. However, to avoid any possible uncertainty, it will amend its order to conform to the language of the aforesaid policy and will provide for a verbal warning rather than verbal counseling.

As its second ground, respondent argues that Mr. Bartow, who the commission found was not impartial, was not the final decisionmaker in the case, but only recommended action to Mr. Macht, who made the final decision. While it is correct that Mr. Macht technically was the final authority in the matter, as pointed out in the commission's decision at p. 12, Mr. Bartow played "the key role in the investigation, predisciplinary hearing, and disciplinary recommendation." Mr. Macht was not even present at the predisciplinary hearing. Under these circumstances, appellant was denied due process.


Because there is no basis for granting a petition for rehearing under s. 227.49, stats., the petition will be denied. Since the commission's decision was issued on an interim basis to permit the filing of any request for fees and costs under s. 227.485(5), stats., and no such request was filed, the commission will now issue the decision as final.

ORDER

The petition for rehearing is denied. The interim decision and order dated June 28, 1991, is issued as the final order in this matter, with the added proviso that any further action taken against appellant must be limited to a verbal warning.

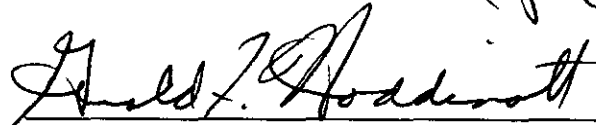
Dated: August 15, 1991

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/ajt/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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