

No. 90-1985

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT III

GEORGE SHOWSH, D.V.M.,

Petitioner-Respondent,

v.

ERRATA SHEET

WISCONSIN PERSONNEL COMMISSION,

Respondent,

**RECEIVED**

DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION,

APR 26 1991

Respondent-Appellant.

Personnel  
Commission

Marilyn L. Graves  
Clerk of Court of Appeals  
231 East, State Capitol  
Madison, WI 53702

Roberta A. Klein  
Chief Staff Attorney  
119 Martin Luther King Blvd.  
Madison, WI 53703

Court of Appeals  
District I  
901 N. Ninth Street  
Milwaukee, WI 53233

Court of Appeals  
District II  
2727 N. Grandview Blvd.  
Waukesha, WI 53188-1672


Court of Appeals  
District III  
740 Third Street  
Wausau, WI 54401-6292

Court of Appeals  
District IV  
231 East, State Capitol  
Madison, WI 53703

Hon. Vivi L. Dilweg  
Courthouse  
Green Bay, WI 54301

Michael R. Fox  
Mary E. Kennelly  
44 E. Mifflin St., #403  
Madison, WI 53703

Bruce A. Olsen  
Asst. Attorney General

 Stephen M. Sobota  
Asst. Attorney General

PER CURIAM. The Department of Agriculture appeals an order reversing a personnel commission order that upheld a two-day suspension of Dr. George Showsh. The Department of Agriculture suspended Showsh, a doctor of veterinary medicine, for failing to provide coverage for vacationing inspectors under his supervision.<sup>1</sup> The trial court ruled that the department's actions violated Dr. Showsh's due process rights because it failed to provide him with adequate presuspension notice and a meaningful opportunity to be heard. The court remanded the question whether Dr. Showsh is entitled to costs and attorney's fees under sec. 227.485, Stats., for reexamination in light of its conclusion that Showsh was denied due process. We affirm the trial court's order.

The due process issue presents questions of "constitutional fact" that this court independently reviews. *See State v. Woods*, 117 Wis.2d 701, 715-16, 345 N.W.2d 457, 465 (1984). The department asserts that this court should extend deference to the commission's decision because it has primary responsibility for determining facts and policy in personnel matters. *See Frank v. Personnel Comm'n*, 141 Wis.2d 431, 434, 415 N.W.2d 533, 535 (Ct. App. 1987). Giving deference to the commission's decision does not mean upholding its decision when it is wrong. Extending full deference to the commission's decision and accepting its findings of fact, we cannot accept its determination that the Department of Agriculture's

---

<sup>1</sup> The department originally suspended Showsh for five days. Upon review, the commission determined that there was just cause to support only one of the charges, and modified the suspension to two days without pay.

presuspension procedures provided Showsh with adequate notice and opportunity to be heard.

Before a person may be deprived of a protected property interest, he must be given notice of the charges against him and a meaningful opportunity to respond. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). The department contends that Showsh had notice of the charges against him based on rumors circulating in the department before his meeting with his supervisors. We cannot agree that the existence of rumors in the work place provides the type of notice contemplated in *Loudermill*.

The department next contends that Showsh received notice because his superior told him that some sort of discipline might result from the investigation and because a general memorandum was distributed to employees requesting information regarding the problem. We cannot agree that the information contained in the memorandum or the general statement of Showsh's supervisor that someone might be disciplined provided adequate notice to Showsh. While Showsh was given an opportunity to tell his supervisor what he knew about the missing inspectors, he was not notified that charges were pending against him or that he was the target of an investigation. Because the department never informed Showsh before his suspension that he was the subject of the investigation, he did not have a meaningful opportunity to be heard. Not only might his defense to the accusations have changed, but he also might have persuaded the decision maker to impose a lesser penalty notwithstanding

PLEASE TAKE NOTICE that the attached pages 2 and 3 are to be substituted for pages 2 and 3 in the above-captioned opinion which was released on April 2, 1991.

Dated this 23rd day of April, 1991.

---

Marilyn L. Graves  
Clerk of Court of Appeals

**FILED**



APR 0 2 1991

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

CLERK OF COURT OF APPEALS  
OF WISCONSIN

**NOTICE**

APRIL 2, 1991

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1)

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**RECEIVED**

APR 4 1991

No. 90-1985

STATE OF WISCONSIN

Personnel  
Commission

IN COURT OF APPEALS  
DISTRICT III

GEORGE SHOWSH, D.V.M.,

Petitioner-Respondent.

v.

WISCONSIN PERSONNEL COMMISSION,

Respondent,

DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION,

Respondent-Appellant.

**RECEIVED**

APR 4 1991

Personnel  
Commission

APPEAL from an order of the circuit court for Brown county: VIVI

L. DILWEG, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The Wisconsin Personnel Commission appeals an order reversing its decision that upheld the two-day suspension of Dr. George Showsh. The Department of Agriculture suspended Showsh, a doctor of veterinary medicine, for failing to provide coverage for vacationing inspectors under his supervision.<sup>1</sup> The trial court ruled that the department's actions violated Dr. Showsh's due process rights because it failed to provide him with adequate presuspension notice and a meaningful opportunity to be heard. The court remanded the question whether Dr. Showsh is entitled to costs and attorney's fees under sec. 227.485, Stats., for reexamination in light of its conclusion that Showsh was denied due process. We affirm the trial court's order.

The due process issue presents questions of the "constitutional fact that this court independently reviews." *See State v. Woods*, 117 Wis.2d 701, 715-16, 345 N.W.2d 457, 465 (1984). The commission asserts that this court should extend deference to the commission's decision because it has primary responsibility for determining facts and policy in personnel matters. *See Frank v. Personnel Comm'n*, 141 Wis.2d 431, 434, 415 N.W.2d 533, 535 (Ct. App. 1987). Giving deference to the commission's decision does not mean upholding its decision when it is wrong. Extending full deference to the commission's decision and accepting its findings of fact, we cannot accept its determination that the Department of Agriculture's

---

<sup>1</sup> The department originally suspended Showsh for five days. Upon review, the commission determined that there was just cause to support only one of the charges, and modified the suspension to two days without pay.

presuspension procedures provided Showsh with adequate notice and opportunity to be heard.

Before a person may be deprived of a protected property interest, he must be given notice of the charges against him and a meaningful opportunity to respond. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). The commission contends that Showsh had notice of the charges against him based on rumors circulating in the department before his meeting with his supervisors. We cannot agree that the existence of rumors in the work place provides the type of notice contemplated in *Loudermill*.

The commission next contends that Showsh received notice because his superior told him that some sort of discipline might result from the investigation and because a general memorandum was distributed to employees requesting information regarding the problem. We cannot agree that the information contained in the memorandum or the general statement of Showsh's supervisor that someone might be disciplined provided adequate notice to Showsh. While Showsh was given an opportunity to tell his supervisor what he knew about the missing inspectors, he was not notified that charges were pending against him or that he was the target of an investigation. Because the department never informed Showsh before his suspension that he was the subject of the investigation, he did not have a meaningful opportunity to be heard. Not only might his defense to the accusations have changed, but he also might have persuaded the decision maker to impose a lesser penalty notwithstanding

justification for the suspension. *See id.* at 544. No postsuspension procedure affords the accused a similar opportunity to persuade the decision makers to forgo their right to impose a particular penalty. We conclude, therefore, that the department's failure to explicitly inform Showsh that he was the target of the investigation and was the accused, not just a witness, violated his due process rights and prejudiced his defense.

The trial court properly remanded the issue of whether Showsh was entitled to recover costs and fees under sec. 227.485, Stats., in light of its decision. The issue presented by that statute is whether the "losing party was substantially justified in taking its position," or whether "special circumstances exist that would make the award unjust." The trial court's decision that the department violated Showsh's procedural due process rights substantially affects the commission's determinations on those issues. Therefore, it was appropriate for the trial court to remand this question for reexamination in light of its decision.

Showsh argues that he is entitled to costs and fees because the department's decision to impose a five-day suspension without pay was not substantially justified. He also asks that this court reverse the part of the trial court's decision concluding that the two-day suspension was not excessive. These issues are not properly before this court because no notice of cross-appeal was filed. Notice of cross-appeal must be filed whenever the respondent seeks modification of the trial court's judgment or order. *See* Rule 809.10(2)(b), Stats.



*By the Court.*--Order affirmed.

This opinion will not be published. Rule 809.23(1)(b)5, Stats.