SOUTH DAKOTA DEPARTMENT OF LABOR and REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota

NICHOLAS A. DAVIS, **HF No. 13G, 2011/12**

Petitioner,

v. **DECISION and ORDER on MOTION FOR SUMMARY JUDGMENT**

CITY OF NORTH SIOUX CITY,

Respondent.

A Petition for Grievance was filed with the Department on March 12, 2012, by Petitioner Nicholas A. Davis (Davis) pursuant to SDCL § 3-18-15.2. Respondent, City of North Sioux City (City) filed an Answer to the Petition on April 2, 2012. Informal Discovery was conducted by the Parties. On July 16, 2012, Davis filed a Motion for Summary Judgment pursuant to SDCL § 3-18-15.2. The parties stipulated to the submission of the documents that provided a basis for City's decision to discharge Davis. The documents submitted by Stipulation are considered the settled record only for the purposes of this Motion for Summary Judgment.

City submitted a Brief in Response to the Motion for Summary Judgment and Davis filed a Final Reply Brief to the Response. The Department being full advised, and by setting forth facts and analysis below, does hereby Grant in part the Motion for Summary Judgment, in favor of Davis.

FACTS

Davis served as a police officer for the City since July 3, 2007. Davis was a member of the police officers' union, Teamsters Local 120, and was covered by a Collective Bargaining Agreement entered into between the union and the City.

On February 28, 2011, Lori Ann Morehead made a criminal allegation against Davis to the South Dakota Attorney General's Office. The allegation is that Davis struck Davis's wife Melissa during a domestic dispute on January 13, 2011. Melissa's mother is Mrs. Morehead. The Division of Criminal Investigation, with the Attorney General's office, opened an investigation into the allegation of domestic abuse/simple assault. Davis was aware of this investigation and cooperated with the DCI investigator. The Union County State's Attorney conflicted themselves out of the investigation and turned the potential prosecution of any criminal charges over to the Yankton County State's Attorney. The DCI investigation concluded on June 29, 2011 when DCI contacted the State's Attorney with the investigation report. On August 11, 2011, a Union County Grand Jury indicted Davis of simple assault (domestic violence) and an arrest warrant was issued for Davis.

On March 28, 2011, prior to the conclusion of the DCI investigation, City suspended Davis without pay until he had concluded an inpatient treatment program recommended by Davis's Department of Veterans Affairs (VA) healthcare provider. There is no indication of what type of inpatient treatment was provided to Davis.

In preparation for this grievance, Davis's supervisor, Chief of Police Jody Frye, prepared a "statement of events" in regards to Davis's employment history. Chief Frye felt that Davis showed a pattern of poor performance and judgment throughout his employment with City. The poor behavior first was exhibited while Davis was at the police academy in early 2008. The SD Law Enforcement Academy advised Chief Frye about Davis's attitude and behavior while at the Academy. The City continued to employ Davis after his return from the Academy.

While at work for the City, Davis received verbal warnings for attitude and behavior on September 17, 2008, and October 25, 2008. On July 21, 2010, Davis received another verbal warning regarding the need for respect and professionalism towards the general public. On September 27, 2010, a written disciplinary warning was placed in Davis's personnel file for causing damage to a patrol vehicle. In early 2011, Sgt. Headid gave Davis two verbal warnings for behaviors exhibited in the training room and the garage. In February 2011, other officers reported Davis's behavior and possible intoxication to supervisors. During the DCI investigation, it was revealed that Davis allowed his five-year-old daughter to activate/discharge his duty Taser weapon in May 2011.

On August 2, 2011, four police officers for the City, who work with Davis, signed statements of grievance, supported by the local police union, indicating their lack of trust in Davis and their desire that Davis not be allowed to return to work for the City. These statements were given to City and the Chief of Police.

On August 12, 2011, the Human Resource Director for City, sent to Davis by certified mail, a letter of termination effective the same day. This letter states in part, "As a result of your recent indictment on charges of domestic violence/simple assault by the Union County Grand Jury and the ongoing investigation by the Department of Criminal Investigation, this letter will serve as written notice that your employment with the City of North Sioux City will be terminated effective today, August 12, 2011…"

The Collective Bargaining Agreement, under which Davis is employed, contains a provision that outlines how a member can be discharged or suspended. The provision reads:

> The Employer shall not discharge, suspend, or discipline any permanent employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of a complaint against such employee to the employee in writing and a copy of the same to the Union, except that no warning notice need be given to an employee before he is discharged or otherwise disciplined if the cause of such discharge is:
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> (A) Dishonesty;

(B) Consumption of alcoholic beverage during the work shift;
(C) Consumption of alcoholic beverage or medication while off duty to the extent that any evidence of such consumption is apparent when reporting for duty, or to the extent that ability to perform is impaired;
(D) Illegal possession or use of controlled drugs or substance or marijuana;
(E) Failure to report a serious accident or incident while on duty;
(F) Insubordination (the flagrant refusal to follow a reasonable and/or lawful order);
(G) Conviction of a felony;
(H) Conviction of a crime involving moral turpitude, dishonesty, or false statement.

It is understood that there are other offenses of extreme seriousness that an employee will be discharged for without a warning letter. Depending upon the circumstances and upon just cause, a lesser discipline to include demotion, suspension, or any other appropriate disciplinary action, short of discharge, may in the discretion of the Department Head, be implemented. It is further understood that a warning notice shall mean that further disciplinary action up to and including suspension or dismissal may occur if the condition causing the issuance of the warning letter is repeated during the effective time of the warning notice. Warning notices shall be in effect for not more than nine (9) months.

Discharge must be by proper written notice to the employee and the Local Union. Any employee may request an investigation of this discharge.

Davis's most recent written warning was on September 27, 2010. Davis was on unpaid administrative leave from City from March 28, 2011 until his discharge on August 12, 2011. When he was placed on unpaid leave, City informed Davis that if he participated in the recommended inpatient treatment program, his employment status would be reviewed. Davis's employment status was not reviewed. Furthermore, during his administrative leave, City was made aware of certain facts that could have been cause for a written warning to be placed in his file, such as the fact that his 5-year-old daughter was allowed to discharge his duty Taser.

The language of the agreement indicates that if an offense if of an extreme serious nature, a warning notice is not necessary before dismissal. Davis was already on un-paid administrative leave and was on notice that he needed to be fit for duty prior to returning to his job. City's position is that the Indictment for simple assault/domestic violence and the results of the DCI investigation were serious enough to preclude the issuance of another warning notice to Davis.

ANALYSIS

A grievance for public employees is defined by SDCL 3.18.1.1. The statute reads:

> The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

SDCL § 3-18-1.1. The Department is granted the jurisdiction under SDCL § 3-18-15.2 to address a Motion for Summary Judgment. The statute reads in part:

> [T]he department, upon the motion of any party, may dispose of any grievance, defense, or claim if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law.

SDCL § 3-18-15.2. The standards for the granting of a motion for summary judgment are clear. The South Dakota Supreme Court has written:

> Summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' … All reasonable inferences drawn from the facts must be viewed in favor of the nonmoving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. On the other hand, '[t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment.'

Chilson v. Kimball School District No. 7-2, 2003 SD 53, ¶7, 663 NW2d 667,669 (quoting *Greene v. Morgan, Theeler, Cogley & Petersen*, 1998 SD 16, ¶6, 575 NW2d 457, 459).

Davis's Petition states that Davis had filed a grievance against his employer for his termination and that the City Council had ratified his termination. This Petition for Hearing on Grievance to the Department of Labor and Regulation is to appeal that decision by the City Council. The Department reviews the petition and facts de novo.

Davis's Motion for Summary Judgment is premised upon the argument that Davis did not receive the protections of pre-termination due process; either a specific warning and notice of impending termination or a due process hearing prior to his dismissal wherein he could rebut the allegations against him. Both parties acknowledge that Claimant has some property interest in continued employment with City. *Hollander v. Douglas County*, 2000 SD 159 ¶12, 620 N3d 181, 185 (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494, 501 (1985). "Additionally, due process must be granted at a 'meaningful time and in a meaningful manner.'" *Gul v. Center for Family Medicine*, 2009 S.D. 12, ¶19, 762 N.W.2d 629, 635 (citing *Hollander* at ¶17, 186 (quoting *Schrank v. Pennington County Bd. of Comm'rs*, 1998 S.D. 108, ¶13, 584 N.W.2d 680, 682).

As City points out in their brief, the United States Supreme Court has expressly stated that there are exceptions to the general rule requiring pre-deprivation notice and hearing in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. *United States v. James Daniel Good Real Property*, 510 US 43, 53 114 S.Ct. 492, 501, 126 L.Ed.2d 490, 62 USLW 4013 (1992). "The three-part inquiry set forth in *Mathews v. Eldridge,* 424 U. S. 319 (1976), provides guidance in this regard. The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose." Id. (citing *Mathews* at 335).

The *Mathews* analysis starts with the private interest affected by the official action. The private interest is Davis' job with the City and his continued career in law enforcement. The official action was a discharge. This discharge will affect Davis' career.

The second part of the test looks at "the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards." The procedures used were to look at the completed investigation and the grand jury indictment. There were no additional safeguards to the legitimacy of the statement of Davis' ex-wife. Davis did not take a plea bargain or go through a criminal trial to see if he was guilty as charged. The letter of termination only mentions the indictment; it did not specify that the discharge was for evidence or incidents such as his drinking before his shift or allowing his daughter to touch his duty Taser. If a pretermination hearing was held, then City could have brought in more information and have clarified the reasons for discharge. There is a probable value in additional safeguards.

The third part of the test looks at "the Government's interests, including the administrative burden of additional procedural requirements." Exigent circumstances did not exist in this case. Davis was on unpaid administrative leave for about five and one-half months, and was not working as a police officer for the City during that time. City was not paying Davis and would lose nothing to have a procedural safeguard such as a pretermination hearing. The indictment alleged Davis to have assaulted his wife eight months prior to the indictment. The DCI investigation was ongoing for about three months. The State's Attorney had the completed investigation report for another three months prior to the Indictment being filed and an arrest warrant issued. City may not have been completely aware of the completion of the DCI

investigation, but at any time during those eight months, it could have held a pretermination hearing. There is little or no additional administrative burden in holding a pretermination due process hearing.

The Mathews analysis guides to the conclusion that a pretermination hearing was warranted in this case. An indictment of a crime while on unpaid leave does not rise to the level of extreme seriousness for which an employee should be discharged without a warning letter or opportunity for a pretermination hearing.

City failed to follow South Dakota law and Davis was denied the opportunity for a pretermination hearing and other due process rights prior to his discharge. Summary Judgment is granted for Davis.

Remedy and Relief

Davis has asked that the discharge be reversed and that he be reinstated and his pay restored to the date of his termination. The South Dakota Supreme Court has written about a remedy and the relief in these circumstances. They wrote:

> According to *Booth v. Church*, the United States Supreme Court defined "remedy" as:
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> > [D]epending on where one looks, "remedy" can mean either specific relief obtainable at the end of a process of seeking redress, or the process itself, the procedural avenue leading to some relief.
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> *Booth v.* Church, 532 US 731, 738, 121 S.Ct. 1819, 1823-1824, 149 L.Ed.2d 958 (2001) (citing Black's Law Dictionary 1296 (7th ed. 1999)). In discussing the scope of Art VI § 20 of the South Dakota Constitution (open courts provision), we examined the nature of a remedy as compared to a recovery. We held that our constitutional based legal system:
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> > could not provide relief to all claimants simply by virtue of the nature of the legal system which through the frailties of human nature may not always result in the vindication of a claim. ..." [T]his merely guarantees every suitor his day in a court of competent jurisdiction; it does not guarantee a remedy accompanied by certainty of recovery."
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> *Wegleitner v. Sattler*, 1998 S.D. 88, ¶31, 582 N.W.2d 688, 697-698 (internal citations omitted).

McElhaney v. City of Edgemont, 2002 S.D. 159, ¶16, 655 N.W.2d 441, 446.

The Remedy to not receiving your "day in court" is to have a due process hearing. Davis received a post-termination hearing in front of the City Commission regarding his discharge. All post-termination due process rights available to Davis were granted. After a hearing in front of the City Council, the Council upheld the Human Resource Department's decision to discharge Davis. Davis was able to present evidence and give rebuttal to the reasons listed for his discharge. Davis has already received the appropriate remedy to the City's initial violation.

Davis's request for reinstatement of position and pay is denied. City is ordered to adhere to the letter of the law regarding pretermination hearings or due process hearings for all future terminations.

The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that Nicholas A. Davis is entitled to judgment as a matter of law. The evidence shows that City of North Sioux City violated, misinterpreted, or inequitably applied an existing Negotiated Agreement, as it applies to the conditions of employment.

In Conclusion, the Department Grants the Motion for Summary Judgment in favor of Nicholas A. Davis. City of North Sioux City is Ordered to give full Due Process rights to employees in the future. As a Due Process Hearing was already held in this matter, the Remedy has already been offered and is complete. Davis's request for reinstatement of position and pay is Denied. Findings of Fact and Conclusions of Law are not required under South Dakota law. This Decision also serves as the Department's Order.

By the Department of Labor, on this ____16_______ day of August, 2012,

________/s/______________________
Catherine Duenwald
Administrative Law Judge