

**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.**

**ORDER ON MOTION FOR  
RECONSIDERATION**

**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(1). 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.

On August 16, 2012, a Decision and Order was entered by the Department, granting Summary Judgment to Davis. The Prayer for Relief, specifically reinstatement and back pay, requested by Davis was not granted.

Davis has moved this Department to Reconsider the Prayer for Relief, citing to SDCL § 15-6-60(b)(1). Davis has pointed out to the Department that a fact found within the Decision on the Motion for Summary Judgment was incorrect. Respondent has filed their Resistance to that Motion for Reconsideration. Davis has filed a Reply to that Resistance.

In the Resistance, Respondent correctly points out that under the South Dakota Administrative Procedures Act, there is no specific method for the Department to reconsider a decision. The South Dakota Supreme Court has addressed this issue on a prior occasion, ruling:

Nothing in South Dakota's Administrative Procedures Act authorizes an administrative agency to reconsider a decision in a contested case. See SDCL ch 1-26. However, "administrative agencies have the inherent authority to correct adjudications which appear to be erroneous." *Stearns-Hotzfield v. Farmers Insurance Exchange*, 360 N.W.2d 384, 389 (Minn.Ct.App. 1985) (citing *Anchor Casualty Company v. Bongards Cooperative Creamery Association*, 91 N.W.2d 122 (Minn 1958); State ex rel. *Turnbladh v. District Court, County of Ramsey*, 107 NW.2d 307 (Minn 1960)).

*Jundt v. The Hon. A.P. Fuller*, 2007 S.D. 62, ¶7, 736 N.W.2d 508, 512 (footnote omitted).

The Department, after reviewing the stipulated evidence submitted previously, as well as the briefs and arguments from both parties, does now correct a decision that was erroneous. One fact, which led to the specific remedy in the previous decision, was made in error. Because of that error, I now reconsider the specific fact and the prayer for relief. The Facts as set out in the original Decision and Order are fully adopted with the exception of one specific fact.

After being discharged by Respondent, Davis was allowed to submit documentation to the City of North Sioux City, City Council. Although he had requested a post-termination hearing in front of the City Council, Davis was not allowed a post-termination hearing. City Council limited its review of the grievance and the termination to those document submitted by the parties. There was no opportunity for Davis to know the charges against him, respond to those allegations or question witnesses. This information was stipulated to by the parties as evidence in the Motion for Summary Judgment and an error was made in the resulting Decision.

On March 2, 2012, Davis, through his attorney, submitted documents to Respondents and made his objections known to Respondents of the process. The response to the submission of the documents came about the day after the City Council met in executive session. Respondent's Counsel wrote to Davis's Counsel:

Based on your letter of March 2, the City concluded that it was not necessary to introduce their documents to the Council but rather provided a summary in executive session. Chief Frye who had first hand knowledge of the events leading up to the termination was present to address questions.

In addition the Council was presented with your response letter of March 2 for their review. The Council was then informed that they had three options based on the Union Contract – to reject the staff's recommendation, to ratify the staff's recommendation or determine some other resolution.

After considering both the City staff's information and your letter the Council did vote in open session. The roll call vote was unanimous to ratify the termination decision.

Affidavit of Richard D. Casey, ¶4.

Although counsel for Davis submitted a letter and other information to Respondent, neither Davis nor his counsel was allowed to personally address Respondent in regards to that information. Davis' supervisor gave a presentation to Respondent without Davis' presence.

That presentation by Davis' supervisor is not a due process post-termination hearing. Davis did not receive a pre-termination or a post-termination hearing. “[D]ue 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).

Summary judgment is granted in favor of Davis.

## ANALYSIS

The Parties had stipulated to certain evidence. The Facts as stipulated, and as now found, require a different remedy than what was given in the prior decision. The Remedy is corrected in light of the obvious error.

### 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:

[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.

*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:

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.”

*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 did not receive a pre-termination or post-termination hearing in front of the City Commission regarding his discharge. Therefore, Respondent is to give Davis a post-termination hearing that would afford Davis the due process rights guaranteed under his contract with employment with Respondent and South Dakota law.

Davis’s request for back 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.

Upon reconsideration of the previous Order granting Summary Judgment, the Department grants the Motion for Summary Judgment in favor of Nicholas A. Davis. The City of North Sioux City is Ordered to hold a post-termination hearing to afford Davis full Due Process rights. Davis is returned to the position that he would have been in, had a proper due-process post-termination hearing been granted.

The City of North Sioux City is Ordered to give full Due Process rights to employees in the future, in conformance with South Dakota law. Davis's request for back pay and reinstatement to a paid position 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 3rd day of October, 2012,

\_\_\_\_\_/s/  
Catherine Duenwald  
Administrative Law Judge