IN THE SUPREME COURT OF IOWA

No. 20-0822

JEFFREY WILLIAMS

Appellant,

versus

SCOTT BECKNER AND MARK BULLOCK,

Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR JOHNSON COUNTY
THE HONORABLE ANDREW CHAPPELL
NO. CVCV079931

APPELLANT'S AMENDED BRIEF

SMITH MILLS
SCHROCK BLADES, P.C.

Skylar J. Limkemann, AT0012324
118 3rd Ave SE, Suite 200
Cedar Rapids, IA 52406-0036
Telephone: (319) 286-1743
Fax: (319) 286-1748
Email: slimkemann@smithmillslaw.com
ATTORNEY FOR APPELLANT

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Treatises

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in interpreting and applying Iowa Code Section 35C.6.

II. Whether this Court should reverse the district court and sustain the writ.

ROUTING STATEMENT

The Court should retain this case because it presents matters of first impression, constitutional questions, questions of statutory interpretation, substantial questions of enunciating or changing legal principles, and presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Court. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

This is an appeal by Jeffrey Williams (Williams) from the final order of the district court, namely an order annulling Williams' writ of certiorari and dismissing his claims.

Respondents, Scott Beckner (Beckner) and Mark Bullock (Bullock), terminated Williams employment as a Police Officer III for the University of Iowa Department of Public Safety. Williams petitioned the district court for a writ of certiorari. On October 31, 2019, the district court held a one-day evidentiary hearing. At the hearing, the parties agreed that the matter would be tried in equity.

On December 11, 2019, the district court heard testimony from the final witness. On May 5, 2020, the district court issued its ruling. Therein, the district court annulled Williams' writ of certiorari and dismissed his claims. Williams filed a timely notice of appeal.

STATEMENT OF FACTS

University hired Williams under veterans' preference

Williams applied for a police officer position with the University of Iowa Department of Public Safety (DPS), providing his DD-214.[1] The University verified Williams qualified as a veteran on February 10, 2016, confirmed it in writing, and hired Williams under veterans' preference.[2] The University hired Williams as a police officer effective July 18, 2016.[3] Bullock, Chief Lucy Wiederholt (Wiederholt), and Beckner knew Williams is a veteran.[4]

April 14, 2018: residence hall staff find drugs, alcohol, and flammable materials

[1] Ex. 2 (University of Iowa Merit Employment Application); Ex. 1 (DD-214 Form); Ex. 3 (Email from Williams to University regarding veteran's status verification, dated 2/10/16).
[2] App. Vol. I pp. 523, 529 (Ruling at 1, 7).
[3] Ex. 4 at 1; Ex. 67, 913: 3-5.
[4] App. Vol. I p. 529 (Ruling at 7); App. Vol. I pp. 40-41 (HT 40: 19-25, 41: 1-5; 268: 19-25; 269: 1-5).

On April 14, 2018, Catlett Hall was the University's newest, largest residence hall, opening at the start of the 2017-2018 school year.[5] That night, residence hall staff received "multiple complaints" concerning the strong odor of marijuana on the tenth floor of Catlett Residence Hall.[6] Student residence hall staff responded and tracked the odor to Room 1090.[7] They contacted their supervisor, professional staff member Dave Jager, who responded to the scene.[8] After they knocked and announced their presence, Jager and the student staff used their key to enter the room.[9] They observed drugs, paraphernalia, and contraband.[10] Jager moved the items to the center of the floor.[11] Hall staff then called DPS.[12]

Officer Williams is dispatched to the drug call at Catlett Hall

Williams responded to a drug call at Catlett Residence Hall at the request of residence hall staff.[13] A female student residence hall staff member met Williams and escorted him to the tenth floor, informing Williams on the way that hall staff

[5] Ex. 67, 915: 21-25; 916: 1-3; Ex. 62 pp. 684-685.
[6] Ex. 38 at 3.
[7] Ex. 38.
[8] Ex. 38.
[9] Ex. 38.
[10] App. Vol. I p. 529 (Ruling at 7).
[11] Ex. 38 at 3.
[12] App. Vol. I p. 529 (Ruling at 7).
[13] App. Vol. I p. 529 (Ruling at 7), pp. 94-103 (HT pp. 54-63); Ex. 67, 935: 17-20; Ex. 68, Transcript 1 at 17.

received complaints regarding the odor, they keyed into the room, found contraband, and moved it to the center of the room.[14]

Upon exiting the elevator on the tenth floor of Catlett Hall, Williams immediately smelled the strong odor of marijuana, finding it was emitting throughout the floor.[15] At the time, this concerned him because the smell of marijuana gives him a headache, and he thought about its effect on other people on the floor.[16] As he got closer to Room 1090, the smell grew stronger and stronger, causing Williams even more concern.[17] He characterized the odor as a "noxious odor".[18] Williams arrived at the room, found the room door open, and entered.[19] Williams activated his body-camera, recording video and audio from that point forward.[20]

Williams testified that upon entering and smelling the very strong odor of both burnt and fresh marijuana, he believed the room contained more fresh marijuana.[21]

---

[14] App. Vol. I p. 529 (Ruling at 7), pp. 94-103 (HT pp. 54-63); Ex. 67, pp. 937-938.
[15] App. Vol. I pp. 97-98 (HT pp. 57-58); Ex. 67, 935: 21-25; 936-937; 998: 6-12.
[16] App. Vol. I p. 107: 3-17 (HT 67: 3-17); Ex. 67, pp. 934-937: 1-13.
[17] Ex. 67, pp. 936-937.
[18] App. Vol. I p. 529 (Ruling at 7); Ex. 67, 951: 18-19; App. Vol. I pp. 94-103 (HT pp. 54-63).
[19] App. Vol. I pp. 94-95 (HT 54-55).
[20] Ex. 23, X (Williams' body-camera video, dated 4/14/18).
[21] App. Vol. I p. 529 (Ruling at 7); Ex. 67, 939: 10-25; 940: 1-8; see also App. Vol. I pp. 94-103 (HT pp. 54-63).

Williams knew he was not able to charge anyone criminally because the hall staff keyed into the room and that he wasn't there for a criminal investigation.[22] Williams explained that he believed he needed to find what was still in the room because it posed a danger if he took what hall staff found and just left.[23] Williams testified, "I didn't feel like it was responsible for me to just leave."[24] Williams thought he would be negligent in his duties to not address the problem.[25]

Williams decided to search the immediate area where the hall staff found the items of contraband, believing this to be minimally intrusive.[26] Williams asked the hall staff, "Do we think they might have anything else?" Jager responded, "Could be". Williams stated, "I'm gonna open some drawers"…"I can't charge anybody."[27] Jager stated that they couldn't search under their policy.[28] Williams responded, I just don't want to have to come back here again.[29] Williams explained during his interview, and later testified, that his thinking at the time he made the comment was that if he left knowing that the marijuana and contraband was still in the room, it could turn into a much larger health and safety concern for the students in the

[22] Id.; App. Vol. I pp. 100-102 (HT 60: 11-25; 62: 16-22).
[23] Id.
[24] Id.
[25] Ex. 67, 958: 16-24.
[26] App. Vol. I p. 529 (Ruling at 7); Ex. 68 pp. 27-32.
[27] App. Vol. I p. 529 (Ruling at 7); Exs. 23 & X.
[28] App. Vol. I p. 529 (Ruling at 7).
[29] Exs. 23, X at 21:03:38.

building.[30] Williams added he did not know what the students would do when they came back and he did not want to have to come back to a larger scale incident, such as a fire or overdose.[31] Williams explained this at his interview too.[32]

Williams then searched and found contraband.[33] At his interview and arbitration, Williams explained that he searched the desk area on both sides of the room because it is where the hall staff originally found the items of contraband, he smelled the marijuana coming from that area, and that it was the typical place drugs are kept in the dorms.[34] Williams took the contraband he seized to the police department, turned it into evidence, and wrote a report.[35]

Bullock receives email seeking clarification and starts formal investigation

On April 19, 2018, Bullock became aware of an incident involving Williams, which occurred on April 14, 2018, due to an email from Greg Thompson, who is the Director of Residence Education in the University's Housing and Dining Department.[36] Bullock read the email, opened the attached Housing and Dining

[30] Ex. 67, 940: 9-23; pp. 941-942: 1-2; 948: 8-21; Ex.68 Transcript 2 pp. 27-32, 34.
[31] Id.; App. Vol. I pp. 99-100, 114-115 (HT pp. 59-60, 74: 18-25; 75: 1).
[32] Ex. 68.
[33] App. Vol. I p. 529 (Ruling at 7); Ex. 23 & X.
[34] Ex. 67, 942: 3-25; 943: 1-6; Ex. 68 Transcript 2 pp. 27-32, 34.
[35] App. Vol. I p. 529 (Ruling at 7); p. 102: 8-15 (HT 62: 8-15).
[36] App. Vol. I p. 531 (Ruling at 9), p. 224: 1-23 (HT 184: 1-23); Ex. 58, pp. 29-30; Ex. 58, 34: 5-11.

report, and reviewed it as well.[37] Next, Bullock reviewed Williams' incident report.[38]

At arbitration, Bullock testified that after reviewing the email and both reports he had concerns "that a consentless and warrantless search of a residence occurred."[39] He had no concerns with Williams' incident report but for the Housing and Dining Report.[40] Bullock testified that after reviewing the email and both incident reports he then reviewed Williams' body-worn-camera video from April 14, 2018.[41]

Bullock then went to Chief Wiederholt, his direct supervisor.[42] Bullock told Wiederholt that that he received an email inquiry from residence hall staff about the incident, his findings from his review of the reports and video, he wanted her opinion about it, and suggested an investigation.[43] Wiederholt watched Williams' body-cam video up to the point that he was about to exit the dorm room.[44] Because Wiederholt

---

[37] App. Vol. I p. 225: 2-6 (HT 185: 2-6); Ex. 58, 30: 6-10; see also Ex. 25 (Housing and Dining Report, dated 4/14/2018); Ex. 58, 31: 7-9.
[38] App. Vol. I p. 226: 8-20 (HT 186: 8-20); Ex. 58, 30: 6-12; 33: 5-8; App. Vol. II p. 50 (Ex. 24 Williams' incident report, dated 4/14/2018).
[39] Ex. 58, 32: 18-23.
[40] Ex. 58, 36: 2-9.
[41] App. Vol. I p. 531 (Ruling at 9); Ex. 58, 37: 10-17.
[42] App. Vol. I p. 227 (HT 187: 1-19); Ex. 58, 41: 2-13.
[43] App. Vol. I p. 531 (Ruling at 9); Ex. 58, 41: 2-13; 139: 1-11; Ex. 59, 354: 7-14.
[44] App. Vol. I p. 531 (Ruling at 9); Ex. 58, 41: 14-18; Ex. 59, 355: 17-21.

didn't know what her role would be in the case, she stopped watching at that point.[45] Wiederholt agreed with Bullock that a formal administrative investigation was appropriate.[46] She assigned him to investigate and to contact human resources for assistance.[47] Her instructions were not reduced to writing nor documented.[48] While they were in Bullock's office, he asked Wiederholt if "this rises to a level of termination" and she responded "depending on what your investigation gleans or discovers, it potentially could rise to the level of termination if employee and labor relations and human resources supports that."[49] Wiederholt told Bullock that they needed to take this to Beckner.[50] Bullock testified that he did not remember whether he informed Beckner alone, or if Wiederholt was with him, but Beckner was informed of Bullock's initial impression of the incident on April 19, 2018. Beckner told Bullock that he didn't want to hear or see anything and that they needed to conduct an investigation, which Beckner would review when it was over.[51]

Bullock contacted Shelley Stickfort from Employee and Labor Relations; she agreed to assist Bullock.[52] He arranged for the complaint information to be provided

[45] Ex. 59, 355: 3-16.
[46] Ex. 58, 148: 9-12; Ex. 59, 356: 20-24.
[47] Ex. 58, 41: 14-18.
[48] Ex. 58, 148: 13-25; 149: 1-2.
[49] App. Vol. I pp. 269-70 (HT pp. 229-230); Ex. 59, 357: 14-25; 358: 1-2.
[50] Ex. 58, 143: 1-23.
[51] App. Vol. I pp. 302-303 (HT pp. 262-263); Ex. 58, 143: 1-23.
[52] App. Vol. I p. 531 (Ruling at 9); Ex. 58, 41: 19-23; 42: 7-8.

to Shelley and they discussed their next steps, including issuing a summary of the complaint and pursing administrative leave for Williams.[53] Bullock testified that he prepared the summary of complaint pursuant to the Peace Officer Bill of Rights, Iowa Code section 80F.1.[54]

Bullock places Williams on paid administrative leave and notifies him of an investigation

Bullock entered Williams' locker and seized equipment before Williams arrived for his shift.[55] Bullock and Laurie Textor served Williams the summary of complaint, notice of administrative leave, and equipment receipt.[56] Williams testified that he had no idea what he was under investigation for from the April 14, 2018 incident.[57]

Bullock and Stickfort interview University employees

On or about April 24, 2018, Bullock and Stickfort interviewed two student residence hall staff members, one residence hall professional staff member, Dave Jaeger, Monica Marcello, and Sergeant Nick Jay, who was Williams' direct

[53] Ex. 58, 42: 9-17; 43: 1-11, App. Vol. II p. 64 (Ex. 29 Investigation, Summary of Complaint, dated 4/19/2018).
[54] Id.; see also Ex. 58; App. Vol. I p. 240: 12 (HT 200: 12).
[55] App. Vol. I p. 248: 1-20 (HT 208: 1-20).
[56] App. Vol. I p. 531 (Ruling at 9), p. 249: 12-18 (HT 209: 12-18); Ex. 58.
[57] App. Vol. I pp. 121-124 (HT 81, 82: 10-19; 84: 4-8 ("I didn't even know what was going on…")).

supervisor on April 14, 2018.[58] DPS 1010 policy in effect at that time stated witness interviews should be audio recorded.[59] Bullock and Stickfort testified that none of these witness interviews were audio or video recorded.[60] Bullock admitted that they had an audio recorder available and had video recording capabilities at the police department, and that this would not have been a costly or onerous burden on them.[61] The only record from these interviews are Stickfort's handwritten notes. Stickfort provided redacted copies of her notes via email on May 2, 2018 in the afternoon.[62] It is common for investigators to request witnesses to prepare a written statement, but Bullock admitted that they did not ask any witnesses to do this.[63]

Bullock interviews Williams

On April 26, 2018, Williams appeared for a formal administrative investigation interview.[64] Williams was accompanied by counsel.[65] The interview was audio recorded in three separate audio files. The recordings are in the record in

[58] App. Vol. I p. 531-32 (Ruling at 9-10); Ex. 58.
[59] App. Vol. I p. 13 (Ex. 16).
[60] App. Vol. I pp. 180, 288 (HT pp. 140, 248).
[61] App. Vol. I p. 260 (HT 220).
[62] App. Vol. I p. 98 (Ex. 51 Correspondence re Williams' case).
[63] App. Vol. I pp. 263-264 (HT pp. 223-224).
[64] App. Vol. I p. 531 (Ruling at 9), p. 126: 8-10 (HT 86: 8-10); Ex. 68.
[65] Id.

three audio recordings, in addition to transcripts of the recordings (Ex. 68), produced by the State on January 13, 2020.[66]

Before the questioning of Williams started, Stickfort stated,

> Obviously the information that we will glean from this conversation today will be a part of our investigatory summary that will be provided to administrative personnel who have authority and responsibility for making decisions based on the information that we learn through the scope of the process. We will share it with those who have a legitimate business need to know and who have a legitimate reason to make decisions with regard to the outcome and follow up related to the information that we obtain.[67]

At the beginning, Bullock explained to Williams that he was going to be asking him questions; Bullock stated it was not an interrogation rather it "is a conversation".[68] Bullock said he wasn't able to gather sufficient information in reviewing the video and that he needed "to have some more formal conversations" under the Peace Officer Bill of Rights, which is why he served Williams with the summary of the complaint.[69]

During the interview, Williams informed them of his perspective, including his observations and senses at the time of the incident.[70] Bullock testified that no

---

[66] On January 13, 2020, Respondents provided a transcript of each of the three audio recordings from April 26, 2018. See Ex. 68.
[67] Ex. 68, T1 6: 9-20; Ex. 36 (Investigation Audio Recording 1) at 5:07-5:30; App. Vol. I pp. 126-127 (HT 86: 17-23; 87: 1-25).
[68] Ex. 68, Transcript 1 at 15.
[69] Ex. 68, Transcript 1 at 16.
[70] App. Vol. I p. 532 (Ruling at 10); Ex. 68.

specific policies were provided to Williams before his interview, testifying he believed that the standards of conduct and search and seizure policies were provided at the interview.[71]

May 3, 2018 Meeting

At the start of the May 3, 2018 meeting, Stickfort stated to Williams that "they were leaning towards termination."[72] Stickfort stated,

> We want to make sure obviously before we make that decision that we create an opportunity for you to provide information that you think would mitigate that decision. I don't necessarily have an expectation that you'll necessarily repeat anything that you shared with us during the scope of our conversation last week. That information is on the record. But we absolutely want to give you a forum which to provide information which would be important for us to know and to hear.[73]

Moments later, Williams provided his statement.[74]

After Williams provided his statement and information, Stickfort explained the next steps. She stated to Williams and his counsel,

> …we will - - Mark and I will go ahead and excuse ourselves. We'll go back into our office, and we've got folks on call waiting to - - for us to hold this conversation with, provide them all of the information that you've shared, which is why I was sitting here writing fast and furiously. I appreciate that. I'd like to take the recording with me in

---

[71] App. Vol. I p. 252: 14-22 (HT 212: 14-22).
[72] App. Vol. I p. 533 (Ruling at 11); App. Vol. I pp. 136-137 (HT 96: 16-25; 97: 1-5).
[73] App. Vol. II p. 69 (Ex. 45 p. 3); (Audio Recording, dated 5/3/18).
[74] App. Vol. I p. 533 (Ruling at 11), Vol. II p. 67-93 (Ex. 45), Vol. II p. 94-95 (Williams' statement, dated 5/3/18).

> the event there's something they want to hear directly, so I won't leave that in the room.[75]

Bullock admitted that they presented no witnesses, and Wiederholt admitted by the 1010 policy witnesses were not allowed.[76] Bullock and Stickfort left Williams and Eli Hotchkin in the meeting room.[77] Stickfort provided Williams an open records advisory (Ex. 47) and inquired if Williams wished to resign, otherwise they provided no other documents to Williams prior to leaving the room to caucus.[78] Bullock and Stickfort testified that they met in person with Jessica Voelker, University Human Resources Representative, and spoke about what Williams presented.[79] Upon reentering the room, Bullock informed Williams that he was terminated effective immediately.[80] Bullock simultaneously handed Williams a termination letter.[81]

---

[75] App. Vol. II pp. 85-86 (Ex. 45 pp. 19-20); Ex. 36 (Audio Recording, 5/3/18).
[76] App. Vol. I p. 266: 20-22 (HT 226: 20-22); pp. 394-398 (LWT pp. 29-31).
[77] App. Vol. II pp. 84-86 (Ex. 45 pp. 18-20).
[78] Ex. 47.
[79] App. Vol. I p. 533 (Ruling at 11); Ex. 59, 81: 19-25; 82: 1-22; Ex. 60, 468: 9-13; 469 (explaining Voelker was standing in the place of Textor).
[80] App. Vol. I p. 533 (Ruling at 11); App. Vol. II p. 86: 19-25, 87: 1-24 (Ex. 45, 20: 19-25; 21: 1-24).
[81] App. Vol. II p. 87: 8-18 (Ex. 45, 21: 8-18) ("Here is a termination letter that is the original. Things that I want to point out in that letter for you is that it is effective today, May 3, 2018. Therefore, this letter does serve as notice of your termination as a police officer III with the department of public safety and the University of Iowa…"); App. Vol. II p. 96 (Ex. 48 Termination letter, 5/3/18).

Williams grieved his termination and was reinstated by an arbitrator.[82] Additional facts are stated below.

ARGUMENT

Standard of Review

Ordinarily, the standard of review of a certiorari action is for correction of errors at law. Fisher v. Chickasaw County, 553 N.W.2d 331, 333 (Iowa 1996). The district court's findings of fact are binding upon the appellate court if supported by substantial evidence. Id.

The parties tried this case before the district court in equity by consent. The district court memorialized the parties' agreement on the record and noted this in its ruling. (App. Vol. I p. 527. Ruling at 5). Therefore, the standard of review in this case is de novo. See Sille v. Shaffer, 297 N.W.2d 379, 380-81 (Iowa 1980) (where parties tried case by consent in equity, trial court announced on the record that proceedings were equitable and counsel agreed, de novo review applies). As such, if the appellate court finds the district court erred, it may decide the case on the record made without a remand. O'Dell v. O'Dell, 26 N.W.2d 401, 465-66 (Iowa 1947).

[82] App. Vol. I p. 523-26 (Ruling at 1-3).

The standard of review of questions of statutory construction is for the correction of errors at law. Zimmer v. Vander Waal, 780 N.W.2d 730, 733 (Iowa 2010).

Preservation of Error

Williams preserved error by raising each issue to the district court in his pre-trial brief, at the hearings on October 31, 2019 and December 11, 2019, in his post-trial brief, and in his post-trial reply brief. The district court ruled on the issues on May 5, 2020.

I. Overview of Due Process

The Due Process Clause of the Fourteenth Amendment provides that, "[n]o State shall…deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Similarly, the Due Process Clause of Article I, section 9 states, "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9. Generally, the Iowa Supreme Court considers "the federal and state due process clauses to be identical in scope, import, and purpose." Bowers v. Polk County Bd. of Supervisors, 638 N.W.2d 682, 690 (Iowa 2002).

There are two types of due process; substantive and procedural. This case only concerns procedural due process, therefore, no discussion of substantive due

process follows. Courts have long held that procedural guarantees apply whenever the state attempts to remove or significantly alter liberty or property interests. Paul v. Davis, 424 U.S. 693, 710 (1976). The Constitution does not create property interests rather they are created and their dimensions are defined by state law or existing rules. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985); Bennett v. City of Redfield, 446 N.W.2d 467, 472 (Iowa 1989). A person's status as a veteran establishes a protected property interest in employment and entitles the veteran to pre-termination due process. Winter v. Cerro Gordo Cty. Conservation Bd., 925 F.2d 1069, 1072 (8th Cir. 1991).

A public employer cannot deprive a public employee who has a protected property interest in continued employment of the employee's job except pursuant to constitutionally adequate procedures. Loudermill, 470 U.S. at 541. It is not in dispute that Williams has a property interest in his job as a union member and veteran. Thus, the question then becomes what process is he due? Id. The Supreme Court held that a public employee is entitled to pre-discipline oral or written notice of the charges against him, an explanation of the employer's evidence, and a pre-termination opportunity to be heard. Loudermill, 470 U.S. at 546-47 (internal citations omitted); see also 24 Am. Jur. Trials 421 ("A permanent employee has a right to a hearing to test whether or not cause existed for his termination.") (Originally published in 1977).

The United States Supreme Court has held, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).[83] The notice must reasonably convey the requisite information and must provide a reasonable period of time for interested parties to appear. Id. Also, the notice must include the employer's reasons for the proposed decision before they decide to fire the employee. See e.g., Carmody v. Bd. of Trustees of Univ. of Illinois, 747 F.3d 470, 476 (7th Cir. 2014).

In Peery v. Brakke, the employee was called into the office and told to either resign or he would be fired. 826 F.2d 740, 743 (8th Cir. 1987). After refusing to resign, the supervisor handed the employee a notice of termination, specifying seven grounds said to indicate the employee's inability to satisfactorily perform his work. Id. While the employee knew of one of the seven charges before the meeting, he had no notice before of the other six. Id. He had no chance to respond to the new

[83] Scholars have concluded, "Written notice of any adversarial hearing that could result in significant punishment or even termination is a fundamental right." Kevin M. Keenan, Samuel Walker, An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights, 14 B.U. Pub. Int. L.J. 185, 228 (2005).

charges before the supervisor fired him. Id. The employer argued a series of critical memos put the employee on general notice of job performance issues. Id. The Eighth Circuit rejected this argument because the termination letter the supervisor prepared listed seven specific grounds for discharge. Id. The Court observed these charges were largely new to the employee as they had not appeared in any prior memo or letter. Id. The Eighth Circuit concluded the notice of charges against the employee failed to comport with due process and he had no meaningful opportunity to respond pre-termination. Id. The Court also held, "Where an employee receives notice of charges before termination, but is not given an opportunity to respond to the charges until after discharge, due process is not satisfied." Id. at 743–44. The Seventh Circuit also has come to this conclusion. See e.g., Carmody, 747 F.3d at 477 ("Relying on a new charge without providing a meaningful opportunity to respond violates due process").

In Jennings-Fowler v. City of Scranton, 680 Fed.Appx 112, 116 (3rd Cir. 2017), the City provided pre-termination written notice of charges and an amended notice against a female employee, specifying administrative charges of theft, willful destruction or misuse or City property, and intentionally falsifying or altering any City record or report. The City subsequently terminated her employment. Id. The terminated employee challenged her termination, arguing she received insufficient notice. Id. The Third Circuit found that the original and amended charges were

constitutionally insufficient because they amounted to "boilerplate" language and did not provide any explanation of the supporting evidence. Id. In reaching its holding, the Third Circuit reiterated longstanding United States Supreme Court precedent, requiring an explanation of the employer's evidence so that the employee can provide a meaningful response. Id. at 116-117, n.6. The Third Circuit easily resolved the question in favor of the terminated employee given the well-settled law.

In summary, the constitution sets forth the minimum process due to a public employee with a property interest in employment; state statutes may provide a public employee more procedural due process.

II. The Veterans' Preference Statute Provides Heightened Due Process Protections

Since the Civil War, Iowa law has provided qualifying veterans who work in public employment removal protections. See Kitterman v. Bd. of Supervisors of Wapello Cty., 115 N.W. 13, 14 (Iowa 1908). The Kitterman court observed the Civil War era law barred removing a qualifying veteran except for incompetence or misconduct, shown after a hearing, upon due notice, upon stated charges, and with the right of review by certiorari. Id. It also placed the burden of proving incompetence or misconduct on the party making the allegation. Id. Interpreting the 1904 version of the law, the Court concluded the purpose of these protections is to shield a veteran from being unjustifiably removed from public employment. Butin

v. Civil Serv. Com. of City of Des Moines, 162 N.W. 565, 567 (Iowa 1917). More specifically, the Court found the legislative intent of a veteran's right to review his removal in a certiorari action is to "safeguard against wrongful dismissal." Id.; see also Geyer v. Triplett, 22 N.W.2d 329, 332 (Iowa 1946) (recognizing spirit and purpose of the law is to reward those who served their country in time of need) (abrogated on other grounds by statute).

Today, the veterans' preference law is found in Iowa Code Chapter 35C. See Iowa Code Ch. 35C (2018). Although the modern statute has modified who qualifies as a veteran, the removal protections have not substantively changed since the Civil War. Section 35C.6 provides the same Civil War era pre-termination protections of due notice, stated charges of misconduct or incompetence, and a hearing where either incompetence or misconduct is proven. *Compare* Iowa Code § 35C.6 *with* Kitterman, 115 N.W. at 14. Iowa Code Section 35C.6 states,

> No person holding a public position by appointment or employment, and belonging to any of the classes of persons to whom a preference is granted under this chapter, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the right of such employee or appointee to a review by a writ of certiorari or at such person's election, to judicial review in accordance with the terms of the Iowa administrative procedure Act, chapter 17A, if that is otherwise applicable to their case. Upon removal from such position or employment, the person shall be provided written notification of the right of such employee or appointee to a review by a writ of certiorari

> or judicial review. A review by a writ of certiorari shall be filed within three hundred days of the removal of the employee or appointee.

Iowa Code § 35C.6 (2018).

In interpreting Section 35C.6, the Iowa Supreme Court has stood by its longstanding conclusions regarding the intent of the law; "to insure veterans permanency of employment and to protect them from removal except for their own incompetency or misconduct." Kern v. Saydel Com. School Dist., 637 N.W.2d 157, 161 (Iowa 2001); Edwards v. Civil Serv. Comm'n, 287 N.W. 285, 287 (Iowa 1939) (intent is to secure veterans' positions in public service and to prevent removal except for misconduct). Like the Civil War era law, section 35C.7 places "the burden of proving incompetency or misconduct…upon the party alleging the same." Iowa Code § 35C.7 (2018).

A. The district court erred in interpreting Iowa Code Section 35C.6 by conflating "due notice" with "stated charges".

As the district court correctly observed, the Section 35C.6 includes no definition of the phrases "upon due notice" and "upon stated charges". (App. Vol. I p. 540. Ruling at 18). Regardless, courts must interpret the statute to give the words and phrases their ordinary and common meaning. See Branstad v. State ex rel. Nat. Res. Comm'n, 871 N.W.2d 291, 295 (Iowa 2015) (citation omitted). The dictionary definitions of these words are instructive. "Upon is a formal word that is usually unnecessary in place of *on*". *Garner's Dictionary of Legal Usage* 917 (3rd ed. 2011).

Its proper usage is to introduce a condition or event. Id. "Due notice" is defined as, "sufficient and proper notice that is intended to and likely to reach a particular person or the public; notice that is legally adequate given the particular circumstance." *Black's Law Dictionary* (11th ed. 2019). "Stated" is defined as "1. Fixed; determined; settled <at the stated time> <settlement for a stated amount>. 2. Expressed; declared <stated facts>." *Black's Law Dictionary* (11th ed. 2019). "Charge" is defined as, "A formal accusation of an offense as a preliminary step to prosecution <a murder charge>." *Black's Law Dictionary* (11th ed. 2019). "[T]o *charge* is to accuse formally of a serious offense." *Garner's Dictionary of Legal Usage* 150 (3rd ed. 2011).

Additionally, courts must consider the phrases in the context they were used in the statute. Branstad, 871 N.W.2d at 295 (requiring court to consider words in context). Given the common meaning of the words[84], it follows that the statute's inclusion of the word "upon" before both "due notice" and "stated charges" are conditions precedent to the hearing and removing a veteran for either incompetence or misconduct under section 35C.6. Reading the definitions of "upon", "stated", and "charge" together in the context of section 35C.6 shows it is a formal accusation of

[84] The definition of "due notice" is of little help other than to note that it depends on the circumstance.

an administrative offense which includes facts that have been determined *before* a hearing. This interpretation is supported by the case law.

In Kern v. Saydel Com School. Dist., 637 N.W.2d 157 (Iowa 2001), the Court provided guidance on the meaning of these terms. The Court quoted an Iowa Attorney General Opinion from 1909, stating:

> Written charges should be made stating the grounds for the removal, and a copy of such charges, together with notice of the time and place of hearing, should be served upon the accused, and at such time and place the person sought to be removed should have an opportunity to be heard and refute such charges and show why he ought not to be discharged.
>
> Upon hearing if the charges are not sustained by a preponderance of the evidence the person should be exonerated, but if a preponderance of the evidence shows incompetency or misconduct the person should be removed from his position or discharged from employment.

Kern, 637 N.W.2d at 160 (quoting 1909 Op. Iowa Att'y Gen. 146). Notwithstanding, this Court should overrule *Kern* to the extent that it stands for the proposition that a post-termination hearing comports with the statute; Iowa Code section 35C.6 provides a veteran pre-termination rights.

While this Court has not had the opportunity to squarely address the issue of what constitutes "due notice" or "stated charges", a survey of the limited case law suggests employers have followed this guidance in practice. See e.g., Kern, 637 N.W.2d at 159 (finding Kern received a written communication containing allegations of fact, notification that a meeting was scheduled for a date and time, the

purpose of which was "to discuss his continued employment", and the meeting would be step three of the disciplinary process due to poor job performance); Alan v. Wegman, 254 N.W. 74, 78 (Iowa 1934) (finding employer made and filed copy of charges alleging veteran was both incompetent and guilty of misconduct and included reasoning of inattention of duties, but provided no pre-removal hearing); Glandon v. Keokuk Cty. Health Center, 408 F.Supp.2d 759, 765 (S.D. Iowa 2005) (finding veteran presented with "a detailed written letter" setting out the employer's view of the veteran's conduct and the reasoning for termination before decision imposed).

Considering the case law and the canons together shows that "stated charges" must be a formal, written accusation of an administrative offense which includes the alleged facts and grounds for the termination; due notice is a written notice which includes the time and place of the hearing.

Here, the district court's construction and application of the statute is erroneous. To start with, the court framed the issue as "did Williams receive due notice upon stated charges". (App. Vol. I p. 539. Ruling at 17). The court erred because the text of the statute plainly states that "upon due notice" and "upon stated charges" are distinct requirements. Moreover, the court must construct the statute

to give effect to these separate phrases. Thus, by the district court conflating the phrases in identifying the issue and analyzing the law, the court erred.

B. The district court misapplied the law by concluding the "Investigation, Summary of Complaint" constitutes "due notice" under Section 35C.6.

The court concluded that Respondents met the due notice requirement by Bullock providing Williams a written "Summary of Complaint" on April 19, 2018. (App. Vol. I p. 545. Ruling at 23). The problem is that the district court did not apply the requirement that the notice inform the veteran of a hearing and its time and place to the Summary. Had the court done so, it is readily apparent that the Summary makes no reference to a hearing or its time and place. The district court's application of the statute places it in direct conflict with the Iowa Supreme Court's decision in *Kern*. See *supra*. Moreover, the court's conclusion is inconsistent with its findings that Williams did not receive notice of a veterans' preference hearing and that no one with the University or DPS made any reference to Williams' veterans' preference rights. (App. Vol. I pp. 533, 541. Ruling at 11, 19).

Further, the court's reasoning – the Summary informed Williams there were concerns that the warrantless search he performed, along with his conduct during the search, may be in violation of DPS and University policy – is flawed. (App. Vol. I p. 545. Ruling at 23). As a matter of law, the "Summary of Complaint" is not intended to inform an officer of a hearing rather it is to required by the Peace

Officers' Bill of Rights (POBR) to notify an officer that a formal complaint was made against the officer. Iowa Code § 80F.1(5) (providing an officer subject to a complaint shall be provided a written summary of the complaint). The complaint investigation process under Section 80F.1 and the removal process under Section 35C.6 are distinct as a matter of law. *Compare* Iowa Code § 80F.1 *with* § 35C.6. By the statute's plain language, the former is "an investigative process…intended to gather evidence to determine the merit of a complaint which may be the basis for seeking removal…" of the officer. Iowa Code § 80F.1(1)(b) (defining "formal administrative investigation"). The latter is the procedural process for removing a veteran from employment. Iowa Code § 35C.6. Therefore, the court's reasoning is flawed.

Additionally, the district court's conclusion is unsupported by the record evidence. On examination by his counsel, Bullock testified that the reason why he issued the Summary to Williams on April 19, 2018 was because he is required to by the POBR.[85] Indeed, the Summary makes no mention of veterans' preference or the time and place of the hearing.[86] Thus, the Summary's purpose under both the law

[85] Ex. 58 p. 42: 13-17, 23-25; p. 43: 1-11.
[86] Id.

and the facts is not to provide notice of a hearing under Section 35C.6. Therefore, the district court erred in concluding the Summary constituted "due notice".

C. Respondents failed to provide Williams with stated charges, therefore this Court must reverse the district court.

This Court should squarely hold that "stated charges" requires the public employer to state in writing the specific administrative charge, such as a policy violation, with the proposed disciplinary action, the factual grounds for the proposed action, and the employer's reasoning for its proposed decision. See Kern, 637 N.W.2d at 160 (quoting 1909 Op. Iowa Att'y Gen. 146) (Written charges should state grounds for removal). Several reasons support this.

- Constitutional due process requires the employer to provide pre-deprivation notice. See Loudermill, *supra*.
- The veteran will be more likely to have a meaningful pre-disciplinary hearing where he is able to respond to the elements of the charges, the proposed decision, and the employer's reasoning for its decision.
- The risk of erroneous decisions will be reduced.

Here, the record evidence shows Respondents provided Williams no such formal stated charges. In fact, the first reference to anything even close to stated charges is the termination letter Bullock provided, which sets forth specific policy violations. But this denies Williams due process in that he did not have the opportunity to respond before termination. See e.g., Peery v. Brakke, 826 F.2d 740,

743 (8th Cir. 1987). Moreover, this letter fails to include any grounds or reasoning, therefore it neither comports with veterans' preference or due process.

Also, the record evidence shows that their reasoning was not provided to Williams to respond to pre-termination. For example, Bullock admitted that he did not notify Williams in writing or verbally of the reasons he communicated to Wiederholt and Beckner for termination.[87] Likewise, Wiederholt testified she recommended Williams be terminated but did not provide her recommendation or the reasons supporting it to Williams.[88] She also testified that it would not be fair if an officer is not given all of the information and recommendations.[89] Beckner also admitted that his reasoning was not provided to Williams pre-removal.[90] In addition to considering the 1010 Policy as it relates to the notice issue, this Court should consider Respondents' sworn admissions that they violated the policy, which is intended to be a safeguard. Other courts have held, "In disciplinary proceedings, a public body must comply with its own rules and an employee being disciplined is entitled to rely upon those rules." Bell v. Civil Serv. Comm'n, 515 N.E.2d 248, 252 (Ill. App. 1987); Lucas v. Murray City Civil Serv. Comm'n, 949 P.2d 746, 754 (Utah Ct. App. 1997) (To give effect to due process protections, the employing agency and

[87] App. Vol. I pp. 289-90, p. 313: 14-22 (HT pp. 249-250; 273: 14-22).
[88] App. Vol. I pp. 388-89 (LWT pp. 21-22).
[89] App. Vol. I p. 389: 15-23 (LWT 22: 15-23).
[90] App. Vol. I pp. 318-319 (HT pp. 278-279).

reviewing body must adhere to their own rules and policies). Thus, this Court should consider this is not just a case where Respondents violated the law, they also violated their own policies without reason.

D. The district court erred in concluding the investigatory interview and the meeting with Bullock and Stickfort met the hearing requirement under Section 35C.6.

The district court erred in concluding that Williams' interview with Bullock and Stickfort on April 26, 2018 plus the May 3, 2018 meeting satisfied the hearing requirement under Section 35C.6. The court misapplies the law.

First, the district court deciding the interview constitutes a hearing under Section 35C.6 is inconsistent with section 80F.1(1)(d). "'Interview' means the questioning of an officer who is the subject of a complaint pursuant to the formal administrative procedures of the investigating agency, if such a complaint may be the basis for seeking removal, discharge, or suspension, or other disciplinary action against the officer." Iowa Code § 80F.1(1)(d). The interview is a part of the "formal administrative investigation", which is an "investigative process…intended to gather evidence to determine the merit of a complaint". Iowa Code § 80F.1(1)(b). To interpret the code in a way to conclude that a police officer's investigatory interview also constitutes a hearing does not give effect to the legislature's intent to separate the investigatory process from the pre-discipline adjudicatory process called for under Section 35C.6. Iowa Code § 35C.6. If this stands it will also lead to erroneous

decisions by muddying the water between investigations and adjudications. If the legislature intended for "interview" to mean the same thing as "hearing", then it would have said so. What's more, it leads to an absurd construction of the statute.

Notably, if the district court's conclusion is correct that an investigatory "interview" may also constitute a "hearing", then the court also erred as a matter of law because the record evidence shows Williams received no notice that the interview would be a hearing. (App. Vol. II p. 64). Indeed, Bullock wrote in the "Investigation, Summary of Complaint" that he sought to have "an investigatory interview" with Williams. (App. Vol. II p. 64. Ex. 29). Neither "hearing" nor veterans' preference are mentioned in any of the documents Bullock provided Williams. (App. Vol II. 62-64 & Ex. 30). Moreover, the district court's conclusion disregards what everyone understood the interview was at the time; questioning of Williams. (See App. Vol. I pp. 251-252: 1-13).

Second, the district court's conclusion that the May 3, 2018 meeting constituted a hearing because Williams was "given another opportunity to provide information or otherwise justify his actions" is flawed. (App. Vol. I p. 545. Ruling at 23). Just because Williams had the "opportunity to provide information or otherwise justify his actions" doesn't mean that the hearing is sufficient under Section 35C.6. The veterans' preference statute provides Williams with heightened

due process beyond the minimum afforded by the Fourteenth Amendment, which requires an opportunity to respond to reasoning. Interpreting section 35C.6 to require the reasons for their proposed removal of Williams is consistent with the spirit and purpose of the law: "to insure veterans permanency of employment and to protect them from removal except for their own incompetency or misconduct." Kern, 637 N.W.2d at 161; Edwards v. Civil Serv. Comm'n, 287 N.W. 285, 287 (Iowa 1939) (intent is to secure veterans' positions in public service and to prevent removal except for misconduct). Further, it is consistent with the Iowa Supreme Court's precedent that the veterans' preference statute "should be given a liberal construction". Geyer v. Triplett, 22 N.W.2d 329, 332 (Iowa 1946) (abrogated on other grounds) (collecting cases holding the law must be given a liberal construction); Tusant v. City of Des Moines, 300 N.W. 690, 694 (Iowa 1941) (recognizing it is the policy of this state to give statutes protecting veterans in public employment a liberal construction); Babcock v. City of Des Moines, 162 N.W. 763, 764 (Iowa 1917) (abrogated on other grounds); see also Krohn v. Judicial Magistrate Appointing Comm'n, 239 N.W.2d 562, 564 (Iowa 1976). Moreover, any doubt about any of the statute's requirements should have been resolved by the court in favor of Williams. The district court erred by not liberally construing the statute. Therefore, this Court must reverse.

E. Because Respondents failed to afford Williams with a veterans' preference hearing where they showed misconduct in advance of terminating him, this Court should reverse.

Respondents had to provide Williams with a veterans' preference hearing. See Iowa Code § 35C.6. This hearing requires more than the constitutionally required pre-disciplinary opportunity to respond.[91] See Loudermill, 470 U.S. at 546 (opportunity to respond by presenting the employee's side of the story is informal, either in person or in writing, and may explain why the proposed action should not be taken). Unlike the constitutional opportunity to respond, the veterans' preference law adds the requirements that the employer meet its burden of proof to establish incompetency or misconduct by a preponderance of the evidence *before* removing the veteran from employment. See Iowa Code §§ 35C.6-7. Put differently, the employer cannot proceed with terminating the veteran until this showing is sustained. See Kern, 637 N.W.2d at 160 ("Upon hearing if the charges are not sustained by a preponderance of the evidence the person should be exonerated, but if a preponderance of the evidence shows incompetency or misconduct the person should be removed from his position or discharged from employment."). In a

[91] The district court confuses constitutional due process with veterans' preference due process. In enacting sections 35C.6-7, the legislature chose to exceed constitutional due process protections by providing veterans additional public employment protections as a matter of statute. What's more, the Iowa Supreme Court has recognized that constitutional due process and veterans' preference are distinct, and the statute governs. See Kern, 637 N.W.2d at 161.

Loudermill hearing, the employer has no obligation to do anything other than give the employee the opportunity to provide his side of the story and mitigating factors. Loudermill, 470 U.S. at 546.

The following record evidence shows the May 3, 2018 meeting fails to pass muster under Section 35C.6:

- Bullock admitted that no witnesses were presented at the 5/3/18 meeting[92];
- Bullock admitted that there was no court reporter at the 5/3/18 meeting[93];
- Respondents had the ability to seek a legal opinion about Williams' search and did not do so or present it at the hearing[94];
- Respondents' reasoning for the proposed decision was not provided to Williams pre-removal[95];
- Stickfort opened the May 3, 2018 meeting up by referring to it as a *Loudermill* conference, not a veterans' preference hearing[9697];
- Respondents admitted that they did not provide Williams the opportunity to a pre-termination hearing in front of Director Beckner, the decisionmaker,[98], who by policy, was the only one who had the authority to remove Williams[99];

---

[92] App. Vol. I p. 266: 20-22 (HT 226: 20-22). Wiederholt admitted that by the 1010 Policy, no witnesses could be presented. App. Vol. I p. 396-398 (LWT pp. 29-31).
[93] App. Vol. I p. 266: 23-24 (HT 226: 23-24).
[94] App. Vol. I p. 280: 18-20, 24-25 (HT 240: 18-20, 24-25) p. 241: 1-6.
[95] App. Vol. II p. 94 (Ex. 46), p. 307: 11-21.
[96] App. Vol. II p. 68: 6-7 (Ex. 45, 2: 6-7) ("We're here today for a Loudermill conference regarding Officer Jeff Williams.")
[97] The district court misunderstood Williams' argument; labeling the hearing as a veterans' preference hearing is not required, but the fact that it wasn't so identified suggests it was not one. App. Vol. I pp. 541-45 (Ruling at 19-23).
[98] App. Vol. I p. 288: 21-24 (HT 248: 21-24); p. 306 10-12 (HT 266: 10-12); Ex. 62 pp. 589-590.
[99] App. Vol. II pp. 18-20 (Ex. 16 pp. 6-8) (Under DPS 1010 Policy, Captain Bullock and Associate Director/Chief Wiederholt could only make recommendations to

- Beckner and Wiederholt had no contact with Williams regarding the incident before his termination and did not preside over the 5/3/18 meeting[100];
- Williams was under the belief that the meeting was to receive the results of the investigation and their proposed recommendation[101];
- Bullock admitted that they did not notify Williams that he and Stickfort were going to be hearing officers or that their role had changed from investigators to decisionmakers[102];
- Bullock admitted that no information from the 5/3/18 meeting was provided to Beckner or Wiederholt before Williams was terminated[103]; and
- Bullock admitted that going into the 5/3/18 meeting it was "predetermined" that Williams would be terminated pursuant to an order given by Beckner, who at that time had only spoken to Bullock[104].

To remove Williams from his job as a Police Officer III, Respondents, at a veterans' preference hearing, had the burden to prove that Williams engaged in misconduct by a preponderance of the evidence. See Iowa Code §§ 35C.6-7.

CONCLUSION

The evidence shows that Respondents did not show compliance with Williams' rights and did not afford him the process he was due as a veteran under the law or as an officer under the University Department of Public Safety's Policies. The district court erred in interpreting and applying the law. On de novo review,

---

Director Beckner. 1010.10.2 of the policy states, "the Director of Public Safety shall determine the amount of discipline, if any, that should be imposed.").
[100] Ex. 58: 183-188; App. Vol. I p. 306: 10-12; pp. 396-398 (LWT pp. 29-31).
[101] App. Vol. I p. 136: 11-25, 137: 1-5 (HT pp. 96-97).
[102] App. Vol. I p. 266: 7-19 (HT 226: 7-19).
[103] Ex. 58 pp. 184-185; App. Vol. I p. 273 (HT 233).
[104] Ex. 58 pp. 183-188; Ex. 62, 637.

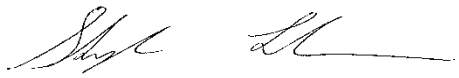
this Court should reverse the district court and sustain the writ, awarding Williams back pay and the relief requested before the district court.

REQUEST FOR ORAL ARGUMENT

Williams requests oral argument.

PROOF OF SERVICE

The undersigned certifies that on the 29th day of October, 2020, he served the Appellant's Amended Brief on counsel for the Appellees electronically using the EDMS. Per Rule 16.317(1)(a), this constitutes service of the document for the purposes of the Iowa Court Rules.



Skylar Limkemann

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 8,368 words, excluding the parts of the brief exempted.

2. This brief complies with the typeface requirement of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately spaced typeface using Microsoft Word 2016 in Times New Roman 14 point type.

CERTIFICATE OF COST

The undersigned certifies the cost of this proof brief (amount actually paid for printing or duplicating paper copies of briefs) was $0.00.