IN THE SUPREME COURT OF IOWA

No. 20-0822

JEFFREY WILLIAMS,

Appellant,

vs.

SCOTT BECKNER and MARK BULLOCK,

Appellees.

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

APPELLANT'S 2nd AMENDED AND SUBSTITUTED REPLY BRIEF

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ARGUMENT

A. Respondents failed to provide Williams with "stated charges"

Respondents concede that "written charges" are required rather they dispute the level of specificity of "stated charges". Respondents argue that the district court correctly approached the issue by putting it "in terms of whether Williams was provided sufficient detail to provide notice of the charges against him." Respondents' Brief at 28. Although the Kern opinion, quoting an Attorney General Opinion, does not elaborate on the level of detail of the "written charges", a nearly century-old opinion of this Court, later opinions in veterans' preference cases, and more recent due process case law sheds some light on the issue.

In Dickey v. Civil Serv. Comm'n, 205 N.W. 961, 962 (Iowa 1925), two police officers with civil service rights challenged their terminations in accordance with the civil service statute at the time by writ of certiorari. They argued that the civil service commission exceeded its jurisdiction because no written charges or specifications of misconduct were filed against them as required by the civil service statute, section 5706 of the 1924 Code, which provided the employer had to file written specifications of the charges and

grounds upon which the ruling was based.[1] Id. They amended their petition to include a veterans' preference claim. Id. However, they introduced no testimony before the commission that they were veterans instead offering their testimony for the first time before the district court. Id. at 963. The district court ruled that the civil service commission acted without jurisdiction because no "stated charges" were filed with the commission. Id. at 964.

Before turning to the veterans' preference issue, the Iowa Supreme Court addressed two issues under the civil service statute. Neither issue is relevant here other than noting that at the time of this opinion, the civil service law required a hearing before the civil service commission and a majority vote of the commission to remove an employee for misconduct. Id. at 963 (citing Iowa Code § 5702 (1924)).

In dicta, the Iowa Supreme Court interpreted the veterans' preference statute in effect at the time. Id. The Court observed, "The term 'stated charges'

[1] The civil service statute's requirement for "the person or body whose ruling an appeal has been taken to the civil service commission to, within five days, file written specifications of the charges and grounds upon which the ruling was based therewith" from Section 5706 of the 1924 Code of Iowa is nearly identical to Iowa Code section 400.22 (2020). The only substantive change is that the 2020 code allows 14 days to file an appeal, whereas the 1924 law only allowed 5 days. *Compare* Iowa Code § 400.22 (2020) *with* Dickey, 205 N.W. at 962 (citing section 5706 1924).

is not a technical one, and we think it obvious that the statute does not contemplate that the charges shall be either technical or formal in character." Id. However, the Dickey Court explained "stated charges" "shall apprise the person affected of the reasons upon which his proposed removal is based". Id. The Court then explained that the basis for reversing the district court was its earlier analysis under the civil service statute and the factual basis the city council included in its notice to the officers. Id. The Court observed that the documents filed before the civil service commission hearing specifically referenced the particular incident at issue, provided the date and location, stated that upon a final hearing the commission would determine the discipline, and recited the misconduct relied upon by the city. Id.

But then the Court went on to hold that the veterans' preference issue was not properly before the Court because the record showed no member of the commission knew at the time of the hearing that the officers were veterans and they apparently made no such claim. Id. at 964. Instead, this issue was first raised at the district court, which under the law at the time, did not afford the Court jurisdiction to address the veterans' preference issue. Id. at 962. Therefore, the Court reversed the district court's judgment sustaining the writ of certiorari on jurisdiction and error preservation grounds. Id. at 964.

While Dickey is easily distinguished from this case[2], it is notable for two reasons. First, the Dickey Court correctly observed that the statute did not provide the level of technicality or formality of the "stated charges". To this day, the statute does not state that "stated charges" shall be technical or formal. But subsequent opinions of this Court interpret section 35C.6 as requiring more formality. See e.g., Kern v. Saydel Com. School Dist., 637 N.W.2d 157, 160 (Iowa 2001); Ervin v. Triplett, 18 N.W.2d 599, 276 (Iowa 1945) (in reviewing the removal provision, Section 1163 of the 1939 Code, noted, "This section sets out the necessity of *specific charges being filed*, and that notice of them and hearing thereon be had in a case of a contemplate removal of a person…") (abrogated on different grounds by Andreano v. Gunter, 110 N.W.2d 649, 653 (Iowa 1961) (holding more specific provision of civil service statute applied over general veterans' preference statute)). What's more, key due process cases relied upon by this Court in Kern, such as Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985), were not even a blip on the radar in 1925. Also, when the Dickey Court rendered its opinion in 1925, the civil service statute required the employer to file specific charges and grounds with the commission, which would then hold a hearing and determine the appropriate discipline. In other words, the old civil service statute was a pre-discipline process, whereas the modern statute

[2] Williams had no civil service rights as he is a state employee.

is a post-termination process.[3] Therefore, the Dickey Court's statement in dicta is of no consequence here as to the specificity of "stated charges".

Second, the Dickey Court's statement that "stated charges" requires the employer to apprise the veteran of the reasons upon which his removal is compelling in addressing the specificity question. This requirement is rooted in constitutional precedent. Citing the Eighth Circuit, this Court has held "that the minimum due process required for even the most informal termination procedure" of a nonprobationary state employee (a teacher) must include:

> 1. Clear and actual notice of the reasons for termination in sufficient detail to enable him or her to present evidence relating to them;
>
> 2. Notice of both the names of those who have made allegations against the teacher and the specific nature and factual basis for the charges;
>
> 3. A reasonable time and opportunity to present testimony in his or her own defense; and
>
> 4. A hearing before an impartial board or tribunal.

Lee v. Giangreco, 490 N.W.2d 814, 817 (Iowa 1992) (citing Agarwal v. Regents of the Univ. of Minn., 788 F.2d 504, 508 (8th Cir. 1986); King v. University of Minn., 774 F.2d 224, 228 (8th Cir. 1985); Brouillette v. Board of Directors of Merged Area IX, 519 F.2d 126, 128 (8th Cir. 1975)). Like the Eighth Circuit, at least the Third and Seventh Circuit Courts of Appeals have held that the

[3] Iowa Code Ch. 400 (2020).

Fourteenth Amendment requires pre-termination notice of the employer's reasons for the proposed termination too. Carmody v. Bd. of Trustees of Univ. of Illinois, 747 F.3d 470, 476 (7th Cir. 2014); Jennings-Fowler v. City of Scranton, 680 Fed.Appx 112, 116 (3rd Cir. 2017). Thus, the portion of the Dickey opinion requiring the employer to inform the veteran of the employer's reasoning for the proposed decision to remove the veteran from employment should be good law. This follows because Section 35C.6 could not be interpreted to provide less due process than the minimum required under existing case law.

Therefore, this Court should squarely hold "stated charges" requires Respondents to provide their reasoning for their proposed removal of Williams. Respondents provided a number of reasons for their termination of Williams' employment, first in the post-termination grievance process (App. Vol. II p. 121; see also Ex. 56 recordings) and then at the hearing in this case over a year and a half later. (App. Vol. I pp. 299-303). For example, Bullock recommended to Wiederholt and Beckner that Williams be terminated, reasoning that he committed "egregious violations of public trust and are against the foundations of what we're sworn to do." Bullock testified Weiderholt believed termination was appropriate as Williams was "untrainable". (App. Vol. I pp. 244-245). None of the reasons were stated to Williams before they discharged him. (*See* App. Vol. I p. 313: 14-25; 314: 1-3; Vol. II p. 121). Providing Williams with the

reasons for the proposed removal would not have been an onerous burden on Respondents because Section 35C.6 is a removal statute, meaning it is only triggered when removal is proposed. Also, they had to know this information before May 3, 2018 as they all had discussed it. (*See* App. Vol. I pp. 302-303, 307).

Requiring Respondents to state their reasoning at the time of the charges is beneficial as a matter of policy because it ensures the integrity and reliability of the process, guards against the risk of memories fading with the passage of time, arbitrary or discriminatory reasoning, or an employer fabricating their reasoning months or years later. What's more, it is in the spirit of the statute, which is to ensure the permanency of employment and to protect veterans from removal except for misconduct or incompetence. Kern, 637 N.W.2d at 161. Such a rule ensures the reasons for the removal do not evade judicial scrutiny should a veteran exercise his right to review in a certiorari action. See Butin v. Civil Serv. Comm'n of City of Des Moines, 162 N.W. 565, 567 (Iowa 1917) (stating legislative intent of removal statute is to "safeguard against wrongful dismissal").

Applying that here, the record evidence previously referenced in Williams' opening brief and herein establishes Respondents failed to provide their reasoning for the proposed decision pre-removal.[4]

Additionally, Respondents argue that the "Investigation, Summary of Complaint" provided "at least some details that gave Williams notice of the charges against him" and that suffices under the statute. Respondents' Brief at 28. Respondents point to the entire first paragraph of it for support including, "…conduct *may* be in violation of University of Iowa Department of Public Safety Policy and/or University of Iowa Work Rules or Policies". Several points eviscerate their reliance on this paragraph.

Respondents' argument and the district court's application of the statute to the facts of this case would lead to an absurd result in that it would permit them to generally cite an entire policy manual as charges against Williams. As Williams and Bullock testified, the DPS policy manual has over 100 policies in it.[5] The statute cannot be read to require Williams to guess which specific sections of the policy Respondents charged him with because that would defeat

[4] Likewise, Bullock admitted he prepared no written recommendations concerning disciplinary action for Williams. App. Vol. I pp. 219-20; *see also* App. Vol. I pp. 316-318.

[5] App. Vol. I p. 121: 13-18; p. 99: 14-25; p. 100: 1; *see also* Ex. 58 p. 132: 24-25; p. 133: 1-3; Ex. 67 p. 924: 2-10.

the purpose of the statute, leaving the precise charges at issue undefined. Such a reading of the statute also fails to ensure that the issues are defined going into the hearing and blocks Williams from having a full and fair opportunity to respond. If the Respondents' and the district court are correct, then an employer could spring anything in the policy manual, or even any provision within a policy, on a veteran, depriving them of their opportunity to respond pre-removal. Further, this position is untenable because it did not permit Williams to ascertain the elements of each policy provision that Respondents had to prove pre-removal, thereby depriving Williams of his right to test the cause and evidence Respondents had at a hearing.

Respondents' admissions also show this Court must reject their contention. At trial, Bullock was asked if he made any statements to Williams at the interview indicating that there were any specific policies from either the 311 or 319 policy that Bullock believed he violated; Bullock testified that he didn't believe so. (App. Vol. I p. 214: 5-11, p. 241 4-10) ("I make it a point to not put specific policies in there [Ex. 29]."). Moreover, Bullock admitted that the Summary made no reference to the word "misconduct". (App. Vol. I p. 219: 1-6). In short, no record evidence establishes that Respondents stated charges against Williams.

To comport with the statute, Respondents simply had to list the specific policies and sections that they accused Williams of violating. When Bullock notified Williams of Beckner's decision to terminate his employment on May 3, 2018, he provided Williams with a termination letter, which listed two policies, 311 – Search and Seizure and 319 – Standards of Conduct, as well as a total of 12 specific subsections and the applicable text from the two policies. (App. Vol II p. 96. Ex. M/48). Bullock admitted at trial that this was the first time he ever referenced any kind of specific policies. (App. Vol. I p. 274: 11-25, 275: 1-6). Had Respondents provided these policies, subsections, and applicable text to Williams pre-discipline, they would have been on their way to complying with the "stated charges" requirement. Stating these charges would not have been an onerous burden; they had the evidence and information before May 3, 2018. (App. Vol. I p. 255: 11-14). Simply put, they failed to afford Williams his rights.

Also, Respondents overall argue that the process comported with the statute, however, this Court should be concerned about the risk of error in allowing what the district court found was a "haphazard" process. It is undisputed that Williams was never afforded an opportunity for a pre-removal hearing with Beckner. (App. Vol. I p. 306: 10-12). Instead, Bullock presented a one-sided view to Beckner, who made the decision to remove Williams without ever speaking to Williams about it or holding a hearing. (App. Vol. I p. 303: 16-

19). As the record evidence shows, Bullock failed to inform Beckner of much of the information that Williams provided during his interview and the May 3, 2018 meeting. Indeed, Bullock primarily told Beckner that Williams relied on the community caretaking exception, when, in fact, he relied on other grounds. (Ex. 45). This one-sided process also does not comport with the statute's hearing requirement because Williams was not afforded the opportunity to invoke the discretion of the decisionmaker, Beckner, pre-removal. Even if a post-removal grievance process grants reinstatement, as it did here, by that time, the damage is done, including to Williams' reputation. The Court cannot permit this kind of one-sided presentation to the decisionmaker as it is patently unfair and runs afoul of the statute.

B. This Court should overrule *Kern* to the extent it stands for the proposition that post-removal process satisfies veterans' preference because the statute provides pre-removal rights

Respondents and the district court heavily rely upon this Court's opinion in Kern for the proposition that post-removal process can satisfy Section 35C.6. See Kern, 637 N.W.2d at 160-61. This Court should overrule that portion of the *Kern* Court's opinion for three reasons. First, to apply the law in the manner Respondents suggest, and like the district court ruled, would defeat the purpose of the statute, which is to afford veterans *pre*-removal rights. (emphasis added).

Nothing in the text of the statute supports the *Kern* Court's opinion that post-grievance process can satisfy the statute. See Iowa Code § 35C.6. Second, the *Kern* Court's rationale is unsound. It is of no consequence that the school district was aware of Kern's post-discharge rights under a collective bargaining agreement. This factor his nowhere in the statute. Moreover, the school district's knowledge is irrelevant to the analysis. The rights under the statute are for the veteran, not the school district. Finally, Kern creates constitutional due process questions. While it cites *Loudermill*, it makes no mention that a pre-discipline explanation of the evidence is required, which is part of *Loudermill's* holding. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546-47 (1985). Williams' interpretation of the statute properly avoids this problem. Therefore, this Court should overrule *Kern* to the extent it holds post-removal process can satisfy Iowa Code section 35C.6.

CONCLUSION

This Court must reject Respondents' contentions that they afforded Williams his veterans' preference rights. No such record evidence supports their claim nor is it grounded in case law. This Court should hold that stated charges requires written charges, affirming *Kern v. Saydel*, but should overrule *Kern* to the extent it suggests a post-removal process satisfies the veterans' preference statute, which provides pre-removal rights. Moreover, this Court should hold

that "stated charges" requires the employer to provide the reasons for the proposed removal of a veteran in advance of a veterans' preference hearing. Additionally, this Court should conclude that Respondents violated Williams' rights. Finally, this Court should reverse the district court's ruling and grant Williams the writ, remanding this case to the district court for an award of back pay and benefits as requested.

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CERTIFICATE OF FILING/SERVICE

I hereby certify that a true and accurate copy of this amended reply brief has been filed electronically with the Clerk of the Iowa Supreme Court and forwarded to all counsel via the electronic filing system on this 29th of October, 2020, and by U.S. Mail for any party not registered to receive notice of filings via the EDMS process.

/s/ Skylar J. 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 2,683 words, excluding the parts of the brief exempted.[6]

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.

/s/ Skylar J. Limkemann

[6] This reply brief was amended and substituted per this Court's order of 10/22/2020. The amended and substituted brief filed on 10/21/20 should be disregarded as this amended brief corrects the issues noted in the Court's order.