

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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SUPREME COURT NO. 20180336

CASS COUNTY DISTRICT COURT NO. 09-2018-CV-00386

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Aaron L. Cockfield, )  
 )  
 )  
 Petitioner and Appellant, )  
 )  
 vs. )  
 )  
 City of Fargo,, )  
 )  
 Respondent and Appellee, )  
 )

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**Appeal from Order of July 14, 2018 and Judgment of August 14, 2018**

**Issued by the Honorable Steven E. McCullough  
Cass County District Court, East Central Judicial District**

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**BRIEF OF APPELLEE – CITY OF FARGO**

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## STATEMENT OF LEGAL ISSUES

- I. Whether the District Court abused its discretion in denying Cockfield's writ of mandamus when it determined that the City of Fargo provided Cockfield with all required due process in the termination of Cockfield's employment?
  - A. Whether the District Court correctly determined that the City provided Cockfield all constitutionally required pre-termination due process rights?
  - B. Whether the District Court correctly determined that the City provided Cockfield all constitutionally required post-termination due process rights?

## STATEMENT OF THE CASE

¶1 Aaron Cockfield (“Cockfield”) initiated a Writ of Mandamus action against the City of Fargo (“City”) through a Petition filed with the Court on January 31, 2018. On March 7, 2018, Cockfield filed a Second Amended Petition for Writ of Mandamus. (App. 4). Cockfield alleged that the City violated his 14<sup>th</sup> amendment right to due process when it terminated his employment. (App. 7). Cockfield sought reinstatement as an employee of the City, back pay and benefits, with interest, dating back to his date of termination, and an award of cost and disbursements. (App. 5).

¶2 The City, in its Answer to Petitioner’s Second Amended Petition for Writ of Mandamus, denied violating Cockfield’s 14<sup>th</sup> amendment right to due process when it terminated his employment. (App. 18-25). The City asserted that Cockfield was provided with notice of the charges against him, an explanation of the evidence, and a meaningful opportunity to be heard in both the pre- and post-termination proceedings. (App. 23).

¶3 Cockfield filed a Motion for Summary Judgment on April 11, 2018, and a Memorandum in Support of Motion for Summary Judgment on May 2, 2018. (App. 2 - Doc Id # 42, 49).

¶4 The parties filed Stipulated Facts on May 2, 2018. (App. 36). The parties filed a Supplemental Stipulation of Fact on May 23, 2018. (App. 54).

¶5 The City filed a Motion for Summary Judgment on May 14, 2018. The City filed the Defendant’s Brief in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendant’s Motion for Summary Judgment on May 24, 2018. (App. 2 - Doc Id # 51, 59).

¶6 On June 18, 2018 a hearing was held before Cass County District Court Judge Steven E. McCullough on both Motions for Summary Judgment. Following a hearing and the consideration of the parties' briefs, the District Court granted the City's Motion for Summary Judgment and denied Cockfield's Motion for Summary Judgment by its Order dated July 24, 2018. (App. 63). The District Court held that the City afforded Cockfield all required due process in the termination of his employment. (App. 69).

¶7 An order for Judgment was filed on August 10, 2018. (App. 70). Judgment herein was filed on August 14, 2018. (App. 72).

¶8 Cockfield filed a Notice of Appeal to this court on September 10, 2018. (App. 74).

#### **STATEMENT OF THE FACTS**

¶9 The City employed Cockfield in its solid waste department. (App. 36, ¶ 2). On July 28, 2017, Cockfield's immediate supervisor, Shawn Eckre, instructed Cockfield, by telephone, to empty a household hazardous waste truck. (App. 36, ¶ 3). Cockfield refused to do so because he believed two co-workers were shirking their responsibilities. (App. 28). After Cockfield refused to perform the work assignment, Bob Gregor and Tanner Carges performed the work assignment. (App. 36, ¶ 3). Eckre then went to speak to Cockfield, who was seated at a computer in the driver's break room at the Fargo solid waste facility, about Cockfield's refusal. (App. 36, ¶ 4). Also in the room at the time was Mark Steffens. (App. 59). As Eckre approached Cockfield, Cockfield stood up, Cockfield put his hands up and pushed Eckre backward causing Eckre to fall against the wall. (App. 36, ¶ 5). Cockfield then clenched his fists whereupon Steffens intervened. (App. 57).



¶10 On August 22, 2017, Cockfield met with Terry Ludlum, director of solid waste operations, and others concerning the July 28, 2017, incident. (App. 37, ¶ 10). The meeting was recorded by Cockfield. (App. 28-35 and 46-52). Ludlum advised Cockfield that they were there to discuss the incident, specifically Cockfield's alleged violations of City policies 300-005 and 400-009. (App. 37, ¶ 11-12). Ludlum further advised Cockfield that, in the opinion of Ludlum, there were sufficient facts concerning his conduct which warranted immediate termination of Cockfield's employment. (App. 38, ¶ 20). Ludlum discussed the incident with Cockfield. (App. 38, ¶ 16). Ludlum also discussed the incident and information he obtained during an investigation including Cockfield's email dated August 1, 2017, and interviews of other solid waste employees. (App. 37, ¶ 13). During the August 22, 2017 meeting, Cockfield was allowed to provide any information or response, including his own explanation of the incident and any disagreement he had with Ludlum's statements. (App. 38, ¶ 16-17). At one point, Cockfield stopped providing further information or responses and stated "[b]ut if you don't believe it, I understand. So, let's just finish this and I can get to my place and call my lawyers and, that's it." (App. 49, lines 21-22).

¶11 At the conclusion of the meeting, Ludlum advised Cockfield that, based upon his consideration of all of the information, Ludlum had determined that the physical altercation was initiated by Cockfield and violated Fargo City Employment Policy 400-009 relating to workplace violence. (App. 38-39, ¶ 22). Ludlum further determined that Cockfield's conduct on July 28, 2017, also violated Fargo City Employment Policy 300-005 relating to refusal of a work directive from an acting supervisor without sufficient cause. *Id.* Ludlum advised Cockfield that his employment was being terminated because of Cockfield's violation of City

policy, effective immediately. (App. 39, ¶ 23). Cockfield was also advised of his rights to appeal Ludlum's decision. (App. 10, App. 33, lines 6-10, and App. 51, lines 6-10).

¶12 Copies of all documents obtained during the investigation conducted by Ludlum were provided to Cockfield's attorney on September 12, 2017, prior to the appeal hearing held by the Fargo Civil Service Commission. (App. 40, ¶ 28). The documents included Cockfield's August, 1, 2017 email; written statements from City employees; a diagram of the driver's room; the August 22, 2017, termination letter; and copies of the relevant City of Fargo employment policies. (App. 39, ¶ 26).

¶13 Cockfield appealed Ludlum's decision terminating his employment to the Fargo Civil Service Commission. (App. 39, ¶ 25). The Civil Service Commission held a hearing on the appeal on September 19, 2017. (App. 39, ¶ 26). In addition to the testimony, statements and argument presented, the Civil Service Commission considered the written statements from City employees, the diagram of the driver's room, the August 22, 2017 termination letter, and copies of relevant City of Fargo Employment Policies. (App. 39). Cockfield also submitted to the Civil Service Commission a video and transcript of a statement taken from Mark Steffens on August 27, 2017. (App. 62). At the conclusion of the Civil Service Commission hearing, the Commission, in a vote of 3-2, upheld the termination of Cockfield's employment based upon his wrongful acts. (App. 40, ¶ 29). Specifically, the Civil Service Commission determined the appointing authority, Terry Ludlum, had concluded that Cockfield violated City of Fargo policies 300-005 and 400-009; Cockfield was terminated in accordance with City of Fargo Policies and Procedures; Cockfield's termination was for cause; and Cockfield's termination was not motivated by political or other improper considerations. *Id.*

¶14 Cockfield appealed the decision of the Fargo Civil Service Commission to the Fargo City Commission. (App. 40, ¶ 30). A hearing was held on October 30, 2017. *Id.* The Fargo City Commission considered all exhibits which had been introduced and received during the Civil Service Commission hearing. *Id.* After considering the matter, the Fargo City Commission upheld the decision of the Civil Service Commission and the appointing authority, Terry Ludlum, by an unanimous vote of 3-0. *Id.*

¶15 Cockfield was represented by counsel at both the Fargo Civil Service Commission and the Fargo City Commission appeal hearings. (App. 40, ¶ 31). There were no statements, exhibits or other documents presented by or on behalf of Cockfield that were not received and taken into consideration. Neither Cockfield nor his attorney were prevented or limited in the presentation of their statements, testimony, evidence or arguments other than the procedure utilized in the post-termination hearings did not allow for cross-examination of witnesses by either Cockfield or the City. The Commission was, however, free to ask questions of any witnesses or the attorneys during the course of the hearing.

#### **STANDARD OF REVIEW**

¶16 The appellate standard of review of a trial court's denial of a petition for a writ of mandamus is an abuse of discretion standard. *Little v. Stark County Sheriff*, 2018 ND 22, 906 N.W.2d 333, 335; *Nagel v. City of Bismarck*, 2004 ND 9, 673 N.W.2d 267. A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner; if its decision is not the product of a rational mental process leading to a reasonable determination; or if the court misinterprets or misapplies the law. *Anderson v. Baker*, 2015 ND 269, 871

N.W.2d 830, 831–32; *In the Interest of B.H.*, 2018 ND 178, 915 N.W.2d 668, 672. An abuse of discretion is never assumed and must be affirmatively established. *Id.* This Court will not reverse a district court’s decision merely because it is not the decision it would have made had it been the initial decision maker. *Id.*

## LAW AND ARGUMENT

### **I. The District Court did not abuse its discretion in denying Cockfield’s writ of mandamus when it determined that the City provided Cockfield with all required due process in the termination of Cockfield’s employment.**

¶17 A court abuses its discretion when it acts in an arbitrary, unconscionable, or unreasonable manner; if its decision is not the product of a rational mental process leading to a reasonable determination; or if it misinterprets or misapplies the law. *Anderson v. Baker*, 2015 ND 269, 871 N.W.2d 830, 831–32; *In the Interest of B.H.*, 2018 ND 178, 915 N.W.2d 668, 672. An abuse of discretion is never assumed, and the burden is on the party seeking relief to affirmatively establish that the district court abused its discretion. *Nesvig v. Nesvig*, 2006 ND 66, 712 N.W.2d 299, 303. An abuse of discretion must be affirmatively established. *Anderson*, 871 N.W.2d at 832.

¶18 A party seeking a writ of mandamus bears the burden of demonstrating a clear legal right to the performance of the particular acts sought to be compelled by the writ. *Nagel*, 673 N.W.2d at 270.

¶19 In Judge McCullough’s Order on Summary Judgment, the court recited the uncontested facts and identified his reasons as to why Cockfield’s Petition for Writ of

Mandamus was being denied. (App. 63-69). Specifically, the District Court determined that Cockfield's pre-termination due process rights were satisfied since Cockfield was given notice of the August 22, 2017, meeting and the reason for the meeting; Ludlum discussed the type of information collected under consideration by Ludlum; Ludlum described how the evidence he was considering was obtained; Cockfield was allowed to respond and provide his own version of the evidence; Cockfield was sufficiently informed of the nature of the charges; and the decision by Ludlum was based upon City of Fargo employment policies. Cockfield was advised that his employment was being terminated effective immediately and he was provided with a letter of termination dated August 22, 2017. (App. 64, 66). The court further determined, based upon the unrefuted facts, that Cockfield refused a work directive from his supervisor and admitted that he made physical contact with that supervisor. (App. 66). The court summarized the pre-termination process as follows:

"As outlined, Cockfield was given notice and a hearing at which the charges were discussed. Ludlum described how evidence was obtained. Cockfield was allowed to respond to the allegations against him and provide his own version of events. Cockfield largely agreed with the version of events detailed in the charges, though he disagreed as to certain details. The requirements of pre-termination due process are written or oral notice of the charges against him, an explanation of the evidence, and an opportunity to present his own side of the story. Cockfield received all of these, and therefore, the requirements of due process were met." (App. 67)

¶20 The court went on to write "Cockfield received notice, a hearing, an explanation of evidence and an opportunity to respond. He was afforded, at the least, the bare minimum for constitutional due process." (App. 67).

¶21 These compelling findings, conclusions, and explanations of applicable law by Judge McCullough do not support Cockfield's argument that the trial court abused its discretion. Cockfield does not explain how the District Court abused its discretion. Nevertheless, Cockfield's position is not supported by controlling case law.

¶22 Judge McCullough's Order on Summary Judgment was based upon uncontested facts and was in accord with established case law regarding minimumly required due process to be provided in pre-termination proceedings and post-termination proceedings. Judge McCullough properly and reasonably determined that the City of Fargo did not violate Cockfield's due process rights by failing to provide for the issuance of subpoenas to the Civil Service Commission nor did it violate Cockfield's due process rights when the hearings were held without cross-examination of witnesses. Judge McCullough's interpretation and application of law was neither arbitrary, unconscionable nor unreasonable. The District Court's Order denying Cockfield's Petition for Writ of Mandamus was not an abuse of discretion.

**A. The District Court correctly determined that the City provided Cockfield all constitutionally required pre-termination due process rights.**

¶23 Cockfield argues that he did not receive required due process during his pre-termination proceedings. However, established case law directly contradicts Cockfield's claims that his due process rights were violated during the pre-termination proceedings.

¶24 Due process is a flexible concept and the procedures depend upon the particular circumstances of each case. In general, due process requires notice of charges and

opportunity for a hearing appropriate to the nature and gravity of the charges. See *Wallace v. Tilley*, 41 F.3d 296, 300 (7<sup>th</sup> Cir. 1994); *Riano v. McDonald*, 833 F.3d 830 (7<sup>th</sup> Cir. 2016).

The cornerstones of due process are notice and the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333 (U.S. 1976).

¶25 Federal law determines what constitutes adequate procedural due process. *Dellano v. Bergland*, 282 F.3d 1031, 1035 (8<sup>th</sup> Cir. 2002). The United States Supreme Court set out the general parameters for pre-termination stage due process for employees having a property interest in their employment in *Loudermill. Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (U.S. 1985). At the pre-termination stage, an employee is entitled to oral or written notice of the charges against him; an explanation of the employer's evidence; and an opportunity to present his side of the story. The intent is to protect the employer's need to handle matters expeditiously with minimal administrative burden while still satisfying the employee's interest in accuracy. The purpose of the pre-termination procedure is not to definitively settle all issues, but to merely act as an initial check against a mistaken decision. Essentially, the pre-termination proceedings are to determine whether reasonable grounds exist to support the disciplinary action being taken against an employee. *Id.* at 545-46.

¶26 Due process does not require full hearings at a pre-termination stage. See *Jackson v. St. Joseph's State Hospital*, 840 F.2d 1387, 1397 (8<sup>th</sup> Cir. 1987); *Krentz v. Robertson*, 228 F.3d 897, 903 (8<sup>th</sup> Cir. 2000) (an employee received adequate due process when he was notified by letter of the decision to terminate his employment, he was informed of the charge against him, and there was an opportunity for the employee to tell his side of the story). *West v. Grand City*, 967 F.2d 362, 368 (10<sup>th</sup> Cir. 1982) ("a brief face to face meeting with a

supervisor provides sufficient notice and opportunity to respond to satisfy the pre-termination due process requirements of *Loudermill*").

¶27 The Eighth Circuit has determined that pre-termination due process only requires that the public employee receive "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Sutton v. Bailey*, 702 F.3d 447 (8<sup>th</sup> Cir. 2012) quoting *Loudermill*, 470 U.S. at 545; *Krentz*, 228 F.3d at 903. See also, *Batagiannis v. West Lafayette Community School District*, 454 F.3d 738, 742 (7<sup>th</sup> Cir. 2006). The Eighth Circuit also held that a public employee "received sufficient due process if he receives notice, an opportunity to respond to the charges before his termination, and post-termination administrative review." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8<sup>th</sup> Cir. 2001); *Sutton*, 702 F.3d at 448; *Wright v. Keokuk County Health Center*, 399 F.Supp. 2d 938, 961 (S.D. Iowa 2005).

¶28 A pre-termination hearing is the employee's chance to clarify the most basic misunderstandings or to convince the employer that termination is unwarranted. *Powell v. Mikulecky*, 891 F.2d 1454, 1458 (10<sup>th</sup> Cir. 1989). "Pre-termination notice of charges and evidence against an employee need not be in great detail as long as it allows the employee the opportunity to determine the facts, if any, within his knowledge which might be presented in mitigation or in denial of the charges." *McDaniels v. Flick*, 59 F.3d 446, 457 (3<sup>rd</sup> Cir. 1985); *Batagiannis*, 454 F.3d at 742.

¶29 The Eighth Circuit has identified four minimum requirements of due process to be met during the employment termination process, either during the pre-termination or post-termination proceedings. *Riggins v. Bd. of Regents of University of Nebraska*, 790 F.2d 707,



712 (8th Cir. 1986). Those four requirements are: (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. *Id*

¶30 An employer does not need to disclose all relevant facts and does not need to provide a copy of an investigative transcript or other material to an employee subject to termination. The failure to do so does not establish the existence of a breach of due process. *Groenwold v. Kelley, et al*, 888 F.3d 365, 373 (8<sup>th</sup> Cir. 2018); *Derstein v. Kansas*, 915 F.2d 1410, 1413 (10<sup>th</sup> Cir. 1990); *Krentz*, 228 F.3d at 903; *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28, 33 (7<sup>th</sup> Cir. 1977). The failure to produce a copy of an investigative report does not violate an employee's pre-termination due process rights. In summary, an employer does not need to disclose all the details underlying the charges against an employee. *Sutton*, 702 F.3d at 448; *Larson v. City of Fergus Falls*, 229 F.3d 692 (8<sup>th</sup> Cir. 2000). Specifically, there is no requirement that an employee must be furnished with all evidence at a pre-termination proceeding. *Rana v. United States*, 812 F.2d 887 (4<sup>th</sup> Cir. 1987); *Myrick v. City of Dallas*, 810 F.2d 1382 (5<sup>th</sup> Cir. 1987); *Jones v. Board of Education*, 651 F.Supp. 760 (N.D. Ind). The same is true with respect to written statements or a diagram of a room. *See Sutton*, 702 F.3d at 448 (we have repeatedly observed an employer need not disclose "all of the details" of the charges against the employee) (quoting *Larson*, 229 F.3d at 697). *See also, Groenwold v. Kelley, supra*.

¶31 In this case, Cockfield argues that his due process rights were violated at the pre-termination meeting because he was not provided with copies of the statements of other department employees; he was not given the names of the employees interviewed; and he did not receive a diagram of the room where the incident occurred. However, the City was not constitutionally required to provide these to Cockfield at the pre-termination stage. *See Groenwold, supra.*

¶32 First, the City provided Cockfield oral notice of the charges against him when Ludlum advised Cockfield that they were at the meeting to discuss the incident and Cockfield's alleged violations of City policies 300-005 and 400-009 relating to his refusal to follow a work directive and his physical assault of another employee. (App. 37, ¶ 11-12, 46, lines 6-16. App. 47 lines 1-18).

¶33 Second, the City provided Cockfield an explanation of its evidence at the pre-termination meeting when Ludlum discussed the information he obtained during his investigation including Cockfield's email dated August 1, 2017, and interviews of other solid waste employees. (App. 37, ¶ 13. App. 46, lines 6-16).

¶34 Third, the City provided Cockfield with an opportunity to present his side of the story when it allowed him to provide any information or response, including his own explanation of the incident and any disagreement he had with Ludlum's statements, during the pre-termination meeting. (App. 38, ¶ 16-17. App. 48, lines 7-20. App. 49, lines 1-22. App. 50 lines 5-8).

¶35 All pre-termination requirements established by *Loudermill* pre-termination requirements were met. Nothing more was constitutionally required. Even though Cockfield

claims he should have been provided names of those who gave statements, copies of the written statements, and a copy of the room diagram prior to termination, case law does not support such a claim. Cockfield does not explain how or why such information would have altered the decision to terminate Cockfield's employment as he admitted that he refused to follow directives from his supervisor and that he physically pushed his supervisor in such a manner causing the supervisor to fall against a wall. None of these documents challenge the essential facts of Cockfield's refusal to perform a job directive or his physical pushing of his supervisor. Cockfield readily admitted in his August 1, 2017, email that he refused to perform the requested task at work and that he physically pushed his supervisor. (App. 26). Such facts, in and of themselves, support the decision to terminate Cockfield's employment with the City. Ludlum could have relied exclusively upon Cockfield's email to warrant Cockfield's termination from employment. Further, during the course of the pre-termination hearing, Cockfield stopped providing further information and responses and stated, "But if you don't believe it, I understand. So, let's just finish this and I can get to my place and call my lawyers and, that's it." (App. 49, lines 21-22). This statement alone suggests that Cockfield was not interested in providing any further information to Terry Ludlum or hearing any further discussion about the incident. Cockfield's arguments that his pre-termination due process rights were violated are unsupported by law, not constitutionally relevant, and are not persuasive.

¶36 Cockfield's argument that an employee is entitled to the names of accusers at the pre-termination stage is not supported by law. Pre-termination due process does not require an employer to release the name of an accuser to the accused employee. *Bexar Cty. Sheriff's*

*Civil Serv. Comm'n v. Davis*, 802 S.W.2d 659, 662 (Tex. 1990). In *Bexar*, Davis's employer gave him notice of which regulation he had violated (regulation prohibiting sexual harassment), an explanation of the basis of the charge (complaints had been filed by unidentified female coworkers), a description of the alleged acts leading to the alleged violation (his alleged acts and statements towards unidentified women), and an opportunity to respond. *Id.* The Texas Supreme court held that Davis was not constitutionally entitled to the names of the women who filed complaints against him at the pre-termination stage. *Id.*

¶37 During the course of the pre-termination meeting, Ludlum informed Cockfield that the meeting was about the July 28, 2017 incident. (App. 37, ¶11). Ludlum also informed Cockfield that he had taken statements from others that were in the room during the incident. Cockfield knew who was in the room at the time the incident occurred and therefore he could have easily discerned the names of those who had given statements. (App. 37, ¶13). Cockfield was ultimately provided with copies of all statements obtained during the investigation as well as the diagram of the break room in advance of the post-termination hearings. (App. 40, ¶28).

¶38 Cockfield's arguments primarily rely on decisions where terminated employees received more process than Cockfield received. However, these cases represent instances where employers went above and beyond what is required by the constitution to satisfy due process at the pre-termination stage. Even though Cockfield did not receive the same level of process as provided in some of the cases he cites, Cockfield fails to establish that the process he received violated his due process rights. (*See Bexar*, 802 S.W.2d at 665 wherein the court recognized that other cases contain fact patterns where employees were afforded

greater due process rights but that such cases do not make those greater afforded rights required under the constitution). Cockfield has cited no authority stating the level of process afforded to him by the City was constitutionally insufficient. Rather, he has only pointed out cases where others were afforded due process beyond what is required under *Loudermill*.

¶39 Cockfield also argues that he was not provided with a copy of the statement dated August 24, 2017, from Patrick T. English. Obviously, said statement could not have been provided to him at the pre-termination meeting held on August 22, 2017, as it was not obtained until after such meeting and termination of Cockfield's employment. The statement of Patrick T. English provides no particular facts of the incident other than a statement that he "witnessed the incident on July 28." (App. 16). The rest of the statement is nothing more than a personal opinion expressed by Mr. English and does not contravene the uncontroverted facts. Even disregarding the entirety of Mr. English's statement, Ludlum had more than sufficient facts to terminate Cockfield's employment. Ultimately, Cockfield presented to the Civil Service Commission a transcript of a recorded interview Cockfield had with Mr. English on August 27, 2017. (App. 62).

¶40 Neither the Eighth Circuit Court of Appeals nor the United States Supreme Court has ever found a deprivation of pre-termination due process when an employee was orally advised of the charges against him; was told of the type of evidence or information considered by the employer; and had an opportunity to provide an explanation as to why the employee should not be terminated. Cockfield's pre-termination due process rights were not violated during the pre-termination meeting held by Terry Ludlum and other City officials in which Cockfield participated.

**B. The District Court correctly determined that the City provided Cockfield all constitutionally required post-termination due process rights.**

¶41 Cockfield argues that his post-termination due process rights were violated because there was neither a provision for the Fargo Civil Service Commission to subpoena witnesses nor a City policy providing for cross-examination of witnesses at the Civil Service Commission hearing or the Fargo City Commission hearing. Both post-termination hearings were held pursuant to the procedures established by Fargo Policy No. 300-008A. (App. 44).

¶42 There is no provision contained within the North Dakota Century Code granting a civil service commission the authority to issue subpoenas. Cockfield provides this Court with no law holding that a breach of due process occurs when the administrative post-termination appeal procedures do not provide for the issuance of subpoenas. The Fourth Circuit has determined that the authority to issue subpoenas is not an essential element of due process at an employee's grievance hearing. *Detweiler v. Comm. of Va. Dept. of Rehab Services*, 705 F.2d 557, 560 (4<sup>th</sup> Cir. 1983).

¶43 Cockfield's argument that his due process rights were violated because he could not cross-examine witnesses at the post-termination hearings ignores the Eighth Circuit's decisions in *Flath v. Garrison Public School District No. 51*, 82 F.3d 244 (8<sup>th</sup> Cir. 1996); *Schuler v. University of Minnesota*, 788 F.2d 510, 515 (8<sup>th</sup> Cir. 1986); *Riggins v. Board of Regents of University of Nebraska*, 790 F.2d 707 (8<sup>th</sup> Cir. 1986); *King v. University of Minnesota*, 774 F.2d 224 (8<sup>th</sup> Cir. 1985); *Raymond v. Board of Regents of the University of Minnesota*, 847 F.3d 585 (8<sup>th</sup> Cir. 2017) and *Peterson v. County of Dakota, Minnesota*, 479

F.3d 555 (8<sup>th</sup> Cir. 2007). *See also, Hauschild v. Nielson*, 325 F. Supp.2d 995 (D. Neb. 2004).

¶44 In *Flath*, the Eighth Circuit determined that Flath's due process rights were not violated by her termination process, regardless of the lack of opportunity to cross-examine witnesses, since she received notice and an explanation of the charges against her and was offered the opportunity to respond to the charges. *Flath*, 82 F.3d at 247. Flath was fired for her "lack of ability to appropriately discipline students." *Id.* at 246. Flath admitted to striking students. The court held that the school was not required to produce witnesses for Flath to cross-examine and the lack of opportunity to cross-examine witnesses did not make the school's procedure constitutionally deficient. *Id.*

¶45 In *Raymond*, the Eighth Circuit rejected a challenge in which the employee argued his due process rights were violated at both the pre-termination and post-termination stage. *Raymond*, 847 F.3d at 585. The court found that Raymond had been advised of the allegations and nature of evidence against him; that he had the opportunity to respond to the allegations; and that he did respond to the allegations. Although he complained that he was never afforded the opportunity to cross-examine the witnesses, the court held that cross-examination of witnesses was not required in the pre-termination stage. The court went on to hold that even if the policies established by the University of Minnesota did not clearly provide for cross-examination of witnesses at post-termination proceedings, Raymond's due process rights were not violated.

¶46 In *Riggins*, the Eighth Circuit determined that the University of Nebraska's post-termination procedure was constitutionally sufficient even though it did not provide for an opportunity to cross-examine witnesses. *Riggins*, 790 F.2d at 711.

¶47 In *Peterson*, the plaintiff alleged that her procedural due process rights were violated when she was terminated. *Peterson*, 479 F.3d at 555. She argued that she was provided with no meaningful post-termination proceedings in which she could cross-examine police officers or present evidence supporting her position. The court dismissed her due process claims finding that she was given both oral and written pre-termination notice of the charges against her; an opportunity to respond in person; and an opportunity to provide supporting information. The court further found that her post-termination process did not violate her due process rights even though the process did not provide for cross-examination of witnesses. The court stressed that she was afforded adequate due process. Peterson was given oral and written pre-termination notice of the charges against her; had an opportunity to respond in person; and had an opportunity to present supporting information.

¶48 In *Hauschild*, the plaintiff alleged she was wrongfully terminated from her employment with the Nebraska State Employee's Credit Union and that her due process rights were violated in the course of her termination. *Hauschild*, 325 F.Supp. 2d at 995. The facts were undisputed. Hauschild was denied the right to call other credit union employees to testify during the post-termination proceedings. The court recognized that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. The court held that the due process clause does not require that terminated employees be provided the opportunity to cross-examine or confront witnesses during a post-termination hearing.

¶49 The Alaska Supreme Court has also concluded that the ability to cross-examine witnesses during a post-termination proceeding is not required and the lack of such cross-



examination does not violate the due process rights of an employee. *City of North Pole v. Zabek*, 934 P.2d 1292, 1298 (Alaska 1997). The Alaska Supreme Court concluded that "[a] full judicial hearing is not necessary, but a hearing that allows the administrative authority to examine both sides of the controversy will protect the interest and rights of all who are involved." (citations omitted). The procedure utilized by the City of North Pole provided for neither the calling of witnesses nor the cross-examination of witnesses. Rather, the parties were allowed to submit witness testimony through affidavits; to submit exhibits; and to provide oral argument to the personnel review board.

¶50 There are a number of adverse implications if an administrative body such as the Fargo Civil Service Commission were required to allow cross-examination of witnesses under the circumstances presented in this case:

- the Fargo Civil Service Commission is a lay body not equipped or trained to control the scope of cross-examination or objections.
- The requirement of cross-examination of witnesses during the hearing would unnecessarily introduce confrontational processes into an informal administrative hearing setting.
- The hearing would potentially be subject to unfettered cross-examination without limitations as to the scope of cross-examination.
- Cross-examination would add time and expense, as well as increase procedural complexity beyond what the administrative body may be equipped to deal with.
- Cross-examination is currently not provided in any City ordinance, policy or procedures applicable to the Civil Service Commission or the Fargo City

Commission. Further, cross-examination is not required by any state statute applicable to an employee disciplinary proceeding.

¶51 Specifically in Cockfield's case, witness credibility was not a material issue. The essential facts of the incident were uncontested. Consequently, the rigors of cross-examination are not necessary and would be unreasonable.

¶52 Cockfield took advantage of the opportunities he had at the post-termination hearings to present his own testimony, explanation and argument as to why the evidence or statements of other witnesses should not be relied upon. Cockfield could have submitted additional arguments, evidence, statements and/or questions to the Civil Service Commission or the Fargo City Commission during the post-termination hearings to be addressed during the hearings or to be considered during their deliberations. Cockfield actually provided the Civil Service Commission and City Commission with his own transcript of an interview with Mark Steffens. (App. 62).

¶53 Based upon all of the proceedings, considering the admitted factual basis for the disciplinary action, Cockfield's opportunity to be heard in a meaningful way before the Civil Service Commission and the City Commission, and the lack of a material challenge to the credibility of witnesses, cross-examination of witnesses at the post-termination hearings was not constitutionally required. This is particularly true because of the fact that Cockfield had notice and an opportunity to be heard.

¶54 Cockfield relies upon a federal district court decision in *Tolson v. Sheridan School Dist.*, 703 F.Supp. 766 (Ed. Ark. 1988). However, that case is not factually or legally comparable to the case at bar. In *Tolson*, Tolson was terminated without cause and without

a pre-termination meeting or hearing. He was not informed of any reason for his dismissal. (pg. 769, ¶¶12 and 14, 16, 18). Tolson was never given notice of any specific charges against him nor was he provided with information or evidence ultimately considered by the school board. Because Tolson had not been apprised of the information provided to the school board, he was denied the opportunity to present any testimony to the effect that his discharge was wrongful. The trial court held that Tolson was entitled to receive oral or written notice and an opportunity to respond prior to his termination. The court found that the facts were "especially grievous because the post-termination procedures were also inadequate under the due process clause." The trial court focused on the lack of notice and meaningful opportunity for Tolson to respond to the charges even at the post-termination stage. Although the trial court discussed the procedures and cross-examination of adverse witnesses, such discussion occurred within the context of the lack of notice and opportunity to be meaningfully heard. The specific requirement of cross-examination of witnesses as argued by Cockfield has not been adopted by the Eighth Circuit Court of Appeals or any other federal circuit court or the U.S. Supreme Court.

¶55 The fundamental requirements of due process is notice and the opportunity to be heard. In *Riggins*, the court identified four basic tenants of due process, which do not include the opportunity to cross-examine or subpoena witnesses in post-termination proceedings.

*Id.* The four requirements of due process include:

- (1) clear and actual knowledge of the reasons for termination in sufficient detail to enable him or her to present evidence relating to him;

- (2) notice of both the names of those who have made allegations against a 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. (citations omitted).

*See also King*, 774 F.2d 224; *Agarwal v. Regents of the University of Minnesota*, 788 F.2d 504 (8<sup>th</sup> Cir. 1986).

¶56 In the case at bar, the City satisfied all four of these requirements during the termination of Cockfield's employment. *See Riggins, supra*. The fundamental facts in this case are uncontested. Cockfield admits that he refused to follow the orders of a supervisor to dump a solid waste vehicle. (App. 36, ¶3). He also admits that he physically pushed his supervisor in the break room. (App. 36, ¶5 and App. 38, ¶19). Like *Riggins*, Cockfield had the ability to be heard and was able to tell his side of the story during the August 22, 2017, pre-termination meeting. (App. 38, ¶16). Cockfield received clear and actual notice of the reason for his termination when Ludlum advised Cockfield that they were there to discuss the July 28 incident and Cockfield's alleged violations of City policies 300-005 and 400-009. (App. 37, ¶ 11-12). Cockfield was given the full opportunity to discuss his version of the incident in addition to his email response. (App. 38, ¶¶ 16 and 17).

¶57 Throughout the post-termination hearings, Cockfield was fully informed of all persons that had provided information to Ludlum, upon which Ludlum made his decision.

Copies of all documents were provided to Cockfield by and through his attorney on September 12, 2017, prior to the appeal hearing held by the Fargo Civil Service Commission. (App. 40, ¶ 28). This included all written statements regarding the incident, the names of the employees who made the statements, Cockfield's email, and the diagram of the break room. Cockfield's termination was based upon admitted facts. Cockfield cannot legitimately deny that he was aware of the factual basis and reasons for the decision to terminate his employment in advance of the post-termination hearings.

¶58 Cockfield was provided with a meaningful opportunity to present his position and argument both in the pre-termination meeting as well as at two separate post-termination hearings. Cockfield was allowed to present testimony, evidence and argument on his behalf in both the pre-termination and post-termination proceedings. Cockfield described the situation from his point of view through his email, through his testimony at the post-termination hearings, and through his attorney's filings, statements and arguments. Cockfield even took the opportunity to present his own recording and transcript of a statement from Mark Steffens. (App. 62).

¶59 Cockfield and his attorney actively participated in two post-termination hearings before impartial boards when he appeared before the Fargo Civil Service Commission and the Fargo City Commission. Cockfield and his attorney took full advantage of the procedures available to Cockfield during both of these post-termination hearings. The City fulfilled all of the requirements set forth by the Eighth Circuit in *Riggins* during Cockfield's termination process. Cockfield's due process rights were not violated as a result of the lack of subpoenas in the post-termination proceedings. *See Detweiler, supra*. Cockfield was free

to present his version of the facts at all post-termination hearings. Any disagreement Cockfield had with the statements made by witnesses to the incident was not material, as Cockfield had already admitted to the acts that ultimately resulted in his termination of employment. Cockfield makes no argument that the Civil Service Commission or the Fargo City Commission were not impartial. Cockfield's post-termination due process rights were not violated.

¶60 Judge McCullough determined that the constitutional requirements of due process were met by the City of Fargo:

"Here, the record establishes that all the requirements were sufficiently met: (1) Cockfield was afforded a pre-termination hearing and a letter of termination, wherein he was informed of the nature of the charges in sufficient enough detail to allow him to prepare to present evidence; \*\* (2) Cockfield had actual notice of the names of those who provided such evidence, and in fact, spoke to the key witness himself, as well as the specific nature and the factual basis of the charges against him, that he refused a direct order from Eckre and that he made violent physical contact with Eckre; (3) Cockfield was able to present his own view of the situation at all three opportunities, including the Fargo Civil Service Commission and Fargo City Commission; and (4) the hearings before the commissions were before impartial boards. All the requirements for procedural due process, both pre-termination and post-termination, were met. There is no requirement for either the ability to cross-examine witnesses or the ability to subpoena witnesses."

Such determination was based upon stipulated facts and was further based upon the application and analysis of current law. Judge McCullough's decision was, therefore, not arbitrary, unconscionable, or unreasonable. It was the product of a rational, mental process leading to a reasonable determination. Judge McCullough's decision was based upon an appropriate interpretation and application of controlling law.

## CONCLUSION

¶61 Cockfield's due process rights were not violated at any point during the pre-termination meeting nor during his post-termination appeal process. The original decision by Terry Ludlum and the subsequent decisions affirming Cockfield's termination of employment by the Fargo Civil Service Commission and the Fargo City Commission were reasonable, lawful and based upon substantial evidence and did not violate any of Cockfield's constitutional rights to due process.

¶62 Judge McCullough considered the undisputed facts and applied appropriate law to conclude that Cockfield's due process rights were not violated at any time by the City of Fargo. While the trial court pointed out that more due process could have been provided by the City of Fargo, the City met the minimum requirements of due process in the course of its employment termination proceedings.

¶63 Based upon the foregoing, Respondent and Appellee City of Fargo respectfully requests that this Court affirm, in all things, the judgment entered herein.

Dated: November 14, 2018

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**CERTIFICATE OF COMPLIANCE**

¶64 The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(a)(7)(A), that the Brief of Appellee – City of Fargo was prepared with proportional typeface, Times New Roman 12 pt. font, and the total number of words in the above Brief, including footnotes, but excluding words in the cover page, table of contents, table of authorities, and this Certificate of Compliance, totals 7,091 words.

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## CERTIFICATE OF SERVICE

¶65 I hereby certify that on the 12<sup>th</sup> day of November, 2018, a true and correct copy of the **BRIEF OF APPELLEE – CITY OF FARGO** was served via email upon counsel for the Petitioner/Appellant as follows:

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