

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

<p>TORY MIERS, Appellant,</p> <p>and</p> <p>STATE OF IOWA (DEPARTMENT OF CORRECTIONS), Appellee.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>CASE NO. 102116</p>
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RULING

Appellant Tory Miers was employed by the State of Iowa, Department of Corrections (DOC), in a position covered by the State’s merit system as created by Iowa Code chapter 8A, subchapter IV. Pursuant to those provisions, Miers could only be terminated for cause. On September 8, 2017, following an investigation conducted by the DOC, Miers was terminated for violations of the DOC General Rules of Employee Conduct and the DOC Policy on Prison Rape Elimination Act (PREA), Staff, Contractors, or Volunteers Sexual Misconduct/Harassment/Retaliation. On November 1, 2017, Miers filed this state employee disciplinary action appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(2)(b) and PERB subrule 621—11.2(2). Miers contends the DOC did not have just cause to terminate her employment. An evidentiary hearing to determine whether just cause supports Miers’ termination is scheduled to be held before the undersigned on November 8 and 9, 2018.

The matter presently before me is Miers' October 19, 2018 motion to exclude certain evidence from consideration in this appeal based on constitutional due process grounds under the 5th and 14th amendment of the U.S. Constitution as well as the Iowa Constitution.¹ From the pleadings thus far, it appears the State's decision to terminate Miers was based upon, at least in part, on allegations made by an inmate in DOC's custody. The inmate has indicated he is unwilling to testify in the proceeding before the undersigned. The State subsequently informed Miers it will not compel the inmate to testify as it contends he is a victim under PREA. In light of the State's decision, Miers seeks "to exclude all evidence based on or referencing" the allegations made by the inmate. Miers contends that allowing any evidence based on the inmate's allegations without giving her an opportunity to confront and cross-examine him during the evidentiary hearing would violate her due process rights as a merit employee who has a recognized property interest in continued employment. The State resists the motion and asserts that admitting the inmate's recorded statements that were provided as part of the DOC investigation into alleged misconduct does not violate Miers' due process.

The "Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally

¹ The Appellant initially filed a motion to exclude the same evidence on August 15, 2018, prior to the original hearing date set for August 16, 2018. Following a conference with the parties, the undersigned continued the hearing and denied the motion to allow the parties an opportunity to resolve the issues raised in the Appellant's motion. The undersigned ordered the Appellant to renew her motion prior to the continued hearing date if her concerns raised in the motion were not resolved following discussions with the State.

adequate procedures.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). “A government employee is entitled to procedural due process only when he has been deprived of a constitutionally protected property or liberty interest.” *Winegar*, 20 F.3d 895, 899 (8th Cir. 1994). Property interests are not created by the Constitution but by an independent source such as state law. *Loudermill*, 470 U.S. at 538. In this case, there is no dispute that Miers, as a merit system employee, has a recognized property interest in continued employment under state law. However, while the parties agree that Miers is entitled to due process, the precise issue to be resolved is whether due process requires that Miers be given an opportunity, in a post-termination hearing, to confront and cross-examine a witness who provided statements against her during the pre-termination investigation.

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). It is well established that due process is “flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

On the specific issue of the right to confront and cross-examine witnesses, the Eight Circuit has previously rejected a discharged employee’s argument that a university grievance procedure was constitutionally inadequate because it would not have granted her the opportunity to confront or cross-examine

witnesses at a post-termination hearing. *Riggins v. Bd. of Regents of Univ. of Neb.*, 790 F.2d 707, 711-12 (8th Cir.1986). In rejecting the employee's argument, the Eight Circuit reiterated the *Matthews* standard and found the procedure in place still gave the employee a fair opportunity to be heard. *Id.* at 712. It recognized that "different situations may require different specific procedures" and ultimately relied on a list of requirements enunciated in an earlier decision to reach its decision, noting:

In a recent case, this court listed four requirements of due process, not including the opportunity to cross-examine or confront witnesses, in the discharge of a tenured professor from a state university:

- 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. (citing *King v. Univ. of Minn.*, 774 F.2d 224, 228 (8th Cir.1985)). The Eight Circuit concluded if the discharged employee had used the grievance procedure in place, due process would have been satisfied because she would have been afforded all of the listed protections and a fair opportunity to be heard. *Id.*

Applying the same requirements to the instant case, I similarly find that due process will be satisfied even if Miers does not have an opportunity to confront and cross-examine the inmate that is now unwilling to testify at this hearing. In regard to the first two requirements, the State has provided Miers will

all the evidence collected during the investigation, including an identification of the witnesses who were interviewed and the content of their statements to the investigators. The termination letter provided her with notice regarding the specific rule violations the DOC found following its investigation. The purpose of providing adequate notice is to inform the employee of the “issues involved in order to prevent surprise at the hearing and allow an opportunity to prepare.” *Wedergren v. Bd. of Dirs.*, 307 N.W.2d 12, 16 (Iowa 1981). The first two requirements are met. The last two requirements are similarly fulfilled because Miers will be given an opportunity to present testimony in her defense during the hearing before an impartial decision-maker.

The Eight Circuit has found that certain conduct in post-discipline procedures may deprive an employee of adequate due process. In *Winegar*, the Eight Circuit found the discharged employee was not provided adequate due process because he “was not allowed a meaningful opportunity to be heard after the initial suspension.” Specifically, the court found the employee’s encounters with the employer were more like “meetings” rather than a “hearing” that would have provided “a meaningful chance to confront [the] allegations” and present witnesses on his own behalf. *Winegar*, 20 F.3d at 901-02.

In another case, under facts easily distinguishable from the instant case, the Eight Circuit has stated it is “fundamental to a full and fair review required by the due process clause that a litigant have an opportunity to be confronted with all adverse evidence and to have the right to cross-examine available

witnesses.” *Nevels v. Hanlon*, 656 F.2d 372, 376 (8th Cir. 1981). In *Nevels*, a discharged employee appealed his termination through the available grievance procedures which included a hearing before an appeal board. After a hearing at which the employee had an opportunity to present his own evidence and cross-examine the employer’s witnesses, the appeal board recommended to the Commissioner of Labor to reinstate the employee. *Id.* After the hearing, however, the Commissioner of Labor had *ex parte* communications with the discharged employee’s supervisor specifically relating to the stated reasons for the employee’s dismissal without notifying the discharged employee or giving him an opportunity to respond. The Commissioner subsequently decided not to adopt the appeal board’s recommendation to reinstate. The Eight Circuit held that the *ex parte* communications that occurred after the hearing and to which the employee could not respond constituted a denial of due process.

The instant case is factually dissimilar to both *Winegar* and *Nevels*. Miers’ appeal before PERB is a contested case within the meaning of Iowa Code subsection 17A.2(5). As such, the evidentiary hearing will be conducted in accordance with the applicable provisions of the Iowa Administrative Procedure Act, chapter 17A, as well as the Public Employment Relations Act, chapter 20, and PERB rules. The hearing will not be a “meeting” as found inadequate in *Winegar*. Instead, the parties will be afforded an opportunity “to respond and present evidence and argument on all issues involved and to be represented by counsel at their own expense.” Iowa Code § 17A.12(4). Additionally, the findings

of fact in the appeal before the undersigned “shall be based solely on the evidence in the record and on matters officially noticed in the record.” Iowa Code § 17A.12(8). The hearing officer is specifically prohibited from “communicat[ing] directly or indirectly with any person or party in connection with any issue of fact or law” involved in this case unless the other party is provided notice and opportunity to participate. Iowa Code § 17A.17(1)(a). Thus, unlike the *ex parte* communications that took place in *Nevels*, any evidence considered in the DOC’s decision to terminate Miers will be presented at the evidentiary hearing during which she will have a full and fair opportunity to respond.

In this section 8A.415(2)(b) appeal, the State bears the burden of establishing that just cause supports Miers’ termination and seeks to present the entirety of the evidence it collected during the investigation that resulted in Miers’ termination. It is evident Miers disagrees with the findings of the DOC’s investigation and its decision to terminate her employment. The evidentiary hearing will give her an opportunity to contradict the DOC’s claims and put forth evidence in her defense.

Consistent with the precedent discussed above, even if the inmate does not testify during the post-termination hearing before the undersigned, due process in this context is met because Miers will be provided with all the evidence the DOC relied upon and a fair opportunity to respond to the allegations and put forth evidence in her defense.

For the foregoing reasons, Miers' motion to exclude evidence is DENIED.

Dated at Des Moines, Iowa this 6th day of November, 2018.

/s/ Jasmina Sarajlija
Administrative Law Judge

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