

April 20, 2011

TO: County Personnel Policy Board Members

SUBJECT: Personnel Policy Board Meeting
Wednesday, April 27, 2011
10:30 a.m., Commissioners Hearing Room
County-City Building, Room 112

NOTE: SPECIAL MEETING DATE AND TIME
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A G E N D A

ITEM 1: Continuation of request for appeal hearing – Debbora Day — Veterans' Services.

ITEM 2: Miscellaneous Discussion.

pc: Debbora Day
Joy Shiffermiller
Gary Chalupa

IN THE LANCASTER COUNTY PERSONNEL POLICY BOARD

DEBORRA DAY,)	
)	
Appellant,)	
)	
v.)	BRIEF
)	
THE COUNTY OF LANCASTER,)	
NEBRASKA,)	
)	
Appellee.)	

CITY - COUNTY PERSONNEL
 2011 APR 18 AM 10 23

NATURE OF THE CASE

This is a case filed by Debbora Day, Appellant, pursuant to Article 19 of the 2008/2011 bargaining agreement between the County of Lancaster, Nebraska, and the American Federation of State, County and Municipal Employees Local 2468 (AFSCME Bargaining Agreement). Appellant was terminated from her employment with the Lancaster County General Assistance Office. Appellant appealed her termination to the Lancaster County Personnel Policy Board. A hearing was held on the appeal on March 3, 2011 and April 7, 2011. At the conclusion of the evidence on April 7, 2011, the motion to affirm the termination resulted in a tie vote of two in favor and two against.

ISSUES BEFORE THE COMMISSION

1. What is the effect of a tie vote in the Personnel Policy Board on the employers decision to terminate an employee and on the employee's request for relief from such termination.

ARGUMENT

- I. WHERE THE VOTE OF THE MEMBERS OF THE PERSONNEL POLICY BOARD IS EVENLY DIVIDED, IT IS TREATED AS A DENIAL OF ANY AFFIRMATIVE

RELIEF ASKED FOR BY THE EMPLOYEE, WHICH WOULD MEAN THAT THE DEPARTMENT HEAD'S DECISION WOULD REMAIN IN EFFECT.

In *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982) an Omaha City employee was discharged by the Omaha City Public Works Department. The employee perfected an appeal to the personnel board. After an evidentiary hearing the personnel board, by a vote of two to two with one member absent, denied the appeal. The employee appealed to the District Court which upheld the denial of the employee's appeal. The employee appealed to the Nebraska Supreme Court and claimed that it was erroneous to place the burden of disproving good cause on her and that the action of the personnel board required three affirmative votes.

The Court found, "The proceeding before the personnel board was an appeal by the plaintiff from the action of the Public Works Department discharging her from her employment by the City. In the absence of an appeal, her discharge would have been final. The general rule is that an appellant has the burden to establish error in the action or order from which the appeal was taken." *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982) Although the plaintiff argued that the home rule charter of the City of Omaha required three affirmative votes for any final action on any matter before the board, the Court found that the record did not contain any provision of the charter and could not take judicial notice of the matter. The Court then held, "In other situations we have held that **where the vote of the members of a tribunal is evenly divided, it is treated as a denial of any affirmative relief.** Such a rule is one of necessity to prevent deadlocks, and to permit a review of the action of the tribunal." *Id.* (emphasis added).

Similarly in *Colburn v. Lancaster County, Nebraska* (Not Designated for Permanent

Publication 1999WL 236461 (Neb. App.), the employment of a noncommissioned court officer was terminated by the Lancaster County Sheriff. The employee appealed her termination of employment to the Lancaster County Personnel Policy Board pursuant to her union contract. A hearing was held in front of the Lancaster County Personnel Policy Board. At the close of the evidence the Board voted on four different motions. The first motion, to overrule the employee's termination of employment and reinstate the employee with all but 3 weeks' back pay, failed due to a 3 to 1 vote by the Board. The next action to affirm the action of the department head ended in a tie vote. Two other votes were made that ended in tie votes. The Board was unclear as to the effect of their voting results and the matter was eventually deferred to a later meeting date at which the Board approved its written decision affirming the employee's termination of employment and denying the employee's appeal.

In its order the Lancaster County Personnel Policy Board stated that under *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W. 2d 241 (1982) the employee had the burden of proof on appeal to show that good cause did not exist for her dismissal and that Colburn had not met her burden. The employee appealed to the Lancaster County District Court, which affirmed the Board's decision. The employee appealed to the Nebraska Court of Appeals. The Nebraska Court of Appeals quoted the Nebraska Supreme Court in *Caniglia* in that, "where the vote of the members of a tribunal is evenly divided, it is treated as a denial of any affirmative relief. Such a rule is one of necessity to prevent deadlocks, and to permit a review of the action of the tribunal." *Id.* The Nebraska Court of Appeals then held that the employee had the burden of proof and, given the tie votes, the employee failed to meet her burden. Therefore the Lancaster County Personnel Board correctly denied the employee any affirmative relief. *Colburn v. Lancaster*

County, Nebraska (Not Designated for Permanent Publication 1999WL 236461 (Neb. App.)).

It should be pointed out that the Nebraska Supreme Court in *Pierce v. Douglas County Civil Service Commission*, 275 Neb. 722, 748 N.W. 2d 660 (2008) called into question the employees burden of proof as provided in *Caniglia*. However, the Court in *Pierce* “declined to decide the continued vitality of *Caniglia*”, and did not overrule or disapprove *Caniglia* regarding the burden of proof. More importantly to the issue at hand in Ms. Day’s case, the Nebraska Supreme Court did not call into question their discussion in *Caniglia* about what occurs during a tie vote of a tribunal.

In Ms. Day’s case, the proceeding before the Lancaster Personnel Policy Board was an appeal brought by Ms. Day from the action of the Lancaster County General Assistance Office discharging her from her employment with Lancaster County. In the absence of an appeal, Ms. Day’s termination would have been final. By filing an appeal Ms. Day is clearly requesting affirmative relief and asking to be reinstated to her position. However, as the Nebraska Supreme Court stated in *Caniglia*, and as the Nebraska Court of Appeals identified in *Colburn v. Lancaster County, Nebraska*, “where the vote of the members of a tribunal is evenly divided, it is treated as a denial of any affirmative relief. Such a rule is one of necessity to prevent deadlocks, and to permit a review of the action of the tribunal.” Therefore, pursuant to *Caniglia*, a tie vote by the Lancaster County Personnel Policy Board in Ms. Day’s case means she has been denied affirmative relief and her termination is upheld.

The “divided court rule”, which has been used in the past by the United States Supreme Court when the U.S. Supreme Court has equally divided on cases, may also provide guidance in determining how a tie vote should be viewed in Ms. Day’s case. The U.S. Supreme Court has

stated,

In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree, be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that the court can proceed to enforce its judgment. The effect would be the same if the appeal, or writ of error, were dismissed. *Durant v. Essex Company*, 74 U.S. (7 Wall.) 107, 19 L.Ed. 154 (1868).

Applying the “divided court rule” to the Lancaster County Personnel Policy Board’s tie vote in Ms. Day’s case would result in the Department Head’s decision to terminate Ms. Day standing in full force, and the Personnel Policy Board entering an order to affirm the Department Head’s decision to terminate Ms. Day.

The conclusion that Ms. Day’s termination should be upheld is further strengthened by the language found in the second paragraph of Lancaster County Personnel Rule 4.8(f)(1). The second paragraph of Lancaster County Personnel Rule 4.8(f)(1) states,

[T]he [Personnel Policy] Board shall affirm the action of the Department Head unless it is clearly established by evidence in the record that: (1) the employee did not commit the transgression(s) charged; or (2) the discipline imposed was not authorized under the provisions of these Rules or the relevant union contract; or (3) the Department Head, in imposing discipline, failed to take into account any mitigating factors which may have existed in connection with the transgression(s).

In Ms. Day’s case, the Board seemed to split on whether the Department Head failed to take into account any mitigating factors. Two Board members seemed to indicate that the Department Head took into account mitigating factors and voted to affirm the Department Head’s action. Two Board members voted against affirming the Department Head’s action, one of whom seemed to indicate that the Department Head did not give enough consideration to Ms.

Day's time on the job. Applying Lancaster County Personnel Rule 4.8(f)(1) to the above situation, it would appear it has not been "clearly established by the evidence in the record that: . . . (3) the Department Head . . . failed to take into account any mitigating factors which may have existed in connection with the transgression(s)." (emphasis added). A tie vote, by its very nature, would indicate that it has not been clearly established that the Department Head failed to take into account any mitigating factors. Therefore, pursuant to Lancaster County Personnel Rule 4.8(f)(1), Ms. Day's termination should be upheld.

II. WHERE THE VOTE OF THE MEMBERS OF THE PERSONNEL POLICY BOARD IS EVENLY DIVIDED, THE TIE VOTE COULD BE TREATED AS NO DECISION AT ALL WHICH WOULD EFFECTIVELY MEAN THAT THE DEPARTMENT HEAD'S DECISION WOULD REMAIN IN EFFECT.

It also should be pointed out that the dissent in *Caniglia* indicated that he would have taken judicial notice of the home rule charter of the City of Omaha, which required three affirmative votes for any final action on any matter before the board. In doing so, the dissent would have held that the personnel board failed to act on the appeal, thereby making the appeal to the Nebraska Supreme Court moot. The Nebraska Supreme Court discussed the issue of a tie vote being ineffective to render a final decision in *Bockbrader v. Department of Public Institutions*, 220 Neb. 17, 367 N.W.2d 721 (1985).

In *Bockbrader* an employee was terminated from her employment by the Department of Public Institutions of the State of Nebraska. The matter was eventually brought before the State Personnel Board. A full evidentiary hearing was held over two days before four board members. This hearing resulted in a tie vote. On its own motion the board held a second hearing before two new board members and one other member. This panel unanimously affirmed the

termination. The matter was appealed to the District Court which upheld the termination. The employee then appealed to the Nebraska Supreme Court. In addressing the question of the personnel board's jurisdiction to rehear the appeal after a tie vote, the Court stated,

. . . . [T]he rule followed by some appellate courts that an equal division is a judgment of affirmance is not applicable here. See *Durant v. Essex Company*, 74 U.S. (7 Wall.) 107, 19 L.Ed. 154 (1869).

Administrative bodies which exercise judicial or quasi-judicial powers have the power to decide controversies. 'The power to decide usually implies the power to reconsider.' *Andrews Van Lines, Inc. v. Smith*, 187 Neb. 533, 536, 192 N.W.2d 406, 408 (1971). The power to reconsider exists until the aggrieved party files an appeal or the statutory appeal period has expired.

Here, no final decision was reached after the first personnel board hearing. The board was equally divided both as to termination and as to allowing the decision of the Director of Personnel to stand. The vote as such was ineffective to render a final decision. 'Any agency determination obviously cannot be final if it is not an effective determination, much less if it is no determination at all.' *Chase v. Board of Trustees of Nebraska State Colleges*, 194 Neb. 688, 694, 235 N.W. 2d 223, 227 (1975). Since the decision of the board was ineffective, and not final, it did not divest the board of its jurisdiction to render a final decision upon rehearing. *Bockbrader v. Department of Public Institutions*, 220 Neb. 17, 367 N.W.2d 721 (1985).

In Ms. Day's case, should the Personnel Policy Board maintain its tie vote, its split decision may be considered a failure by the Board to act on the appeal and may be determined to be ineffective to render a final decision. However, such a "non-decision" by the Personnel Policy Board would effectively mean that the Department Head's decision would remain in effect and Ms. Day would remain terminated from her position.

CONCLUSION

In conclusion, a tie vote by the Lancaster County Personnel Policy Board would result in a denial in Ms. Day's request for affirmative relief and the Department Head's decision to terminate Ms. Day's employment remaining in effect. The Nebraska Supreme Court indicated

“that where the vote of the members of a tribunal is evenly divided, it is treated as a denial of any affirmative relief.” *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982).

Additionally, the action of the Department Head should be affirmed because a tie vote would indicate that it has not been clearly established by the evidence that the Department Head failed to take into account any mitigating factors. Finally, where the vote of the members of the Lancaster County Personnel Policy Board is evenly divided, the tie vote could be treated as no decision at all, which would effectively mean that the Department Head’s decision would remain in effect.

Dated this 18th day of April, 2011.

LANCASTER COUNTY,
NEBRASKA,

By _____


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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Brief was served upon the Appellant by sending a true and correct copy thereof to Appellant's Attorney, Joy Shiffermiller, 1002 G Street, Lincoln, NE 68508, by United States First Class Mail, postage prepaid, this 18th day of April, 2011.

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4/19/2011 8:55 AM

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Ladies and Gentlemen:

Please consider this my brief on behalf of Deb Day with respect to her appeal and the affect of the motion made at the end of her hearing.

Please recall that Ms. Day, a filed an appeal with respect to her termination of employment. It is understood that the appointing authority bears the burden of proof in upholding the termination. This is demonstrated by the fact that they first present evidence and they also have an opportunity for rebuttal. The procedures for Conduct of Hearings Relative to Employee Greivances before the Board, sent to the litigants before this hearing, provide, ***“In hearings which involve suspensions demotions or dismissals for cause the burden of proof shall be on the appointing authority.”*** At the close of evidence a motion was made to uphold the termination. That motion failed. Pursuant to Personnel Policy rule 4.4

4.4 Quorum

Four (4) members of the Board shall constitute a quorum for the transaction of business and three (3) affirmative votes shall be required for final action on any matter acted upon by the Board.

The matter was then adjourned to determine the effect of the tie vote. There is one unreported case directly on point involving an appeal of a termination of a Lancaster county employee. Colburn v. Lancaster County Not Reported in N.W.2d, 1999 WL 236461 Neb.App., 1999. In that case the court considered the following fact pattern:

At the close of all the evidence, the Board voted on four different motions. The first motion, moving to overrule Colburn's termination of employment and reinstate Colburn with all but 3 weeks' back pay, failed due to a 3-to-1 vote by the Board. The next motion, to affirm the action of Wagner, ended in a tie vote. A member of the Board then moved to place the matter on the next agenda in light of the tie vote. The Board did not directly vote on this motion, and two other subsequent motions were made: (1) to find that it had

been clearly established that the department head failed to take into consideration mitigating factors and (2) to remand the imposition of discipline to the department head to render more appropriate discipline. Both motions ended in tie votes. During their meeting, the Board was unclear as to the effect of their voting results, and the matter was eventually deferred to a May 2, 1996, Board meeting at which the Board approved its written decision dated April 16, 1996, affirming Colburn's termination of employment and denying Colburn's appeal. In its order, the Board stated that under *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982), ***Colburn had the burden of proof on appeal to show that good cause did not exist for her dismissal and that Colburn had not met her burden of proof.***

The difference in that case and this case, is that the burden of proof clearly falls not with the employee, but with the appointing authority. It is unknown whether the court was mistaken about the burden, or whether the rules have changed, however it is clear that the appointing authority bears the burden. Further in this case, only one motion was made, that being to uphold the dismissal. That motion failed. The effect of that motion and it's not passing is that the appointing authority failed to meet it's burden and therefore the appeal is granted to the employee.

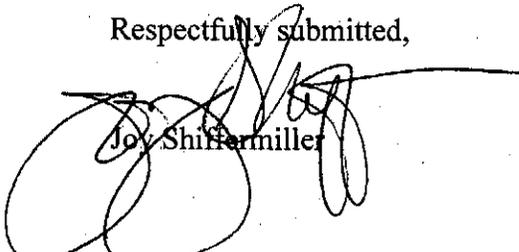
This case has been twice adjourned, and the final adjournment was to consider the effect of the vote. It is submitted additional matters should not be considered.

Pursuant to Personnel Policy rule 4.4

(h) Adjournments: Hearings on appeals or grievances may be adjourned prior to completion of the hearing only upon good cause shown and/or by agreement of the parties.

Ms. Day submits at the close of the evidence there was insufficient evidence that she violated any of the rules alleged, and that the evidence showed that the appointing authority did not properly consider the mitigating factors. The action of the board in not upholding the appointing authority requires a finding that they failed to meet their burden of proof and thus Ms. Days appeal is upheld. She should be reinstated to her job with full back pay.

Respectfully submitted,


Joy Shiffermiller