Memo

DATE: June 21, 1999 PERSL 1357

TO: All State Agencies

FROM: Wayne Simoneau, Deputy Commissioner
Labor Relations/Compensation Division

RE: Pre-Deprivation hearing for Suspensions, Demotions and Employer-Initiated Medical Leaves

Background

As many of you are aware, public employees with property interests in their positions (generally, classified employees who have completed their probationary period) are entitled to notice of the charges against them and an opportunity to respond before discharge. These pre-discharge hearings are commonly called *"Loudermill"* hearings, after the U.S. Supreme Court case of the same name.

We believe that all agencies have been conducting these hearings.

***Loudermill* Hearings for Other Acts of Discipline, Besides Discharge**

In *Gilbert v. Homar*, 520 U.S. 924, 117 S.Ct. 1807, 1811 (1997), the U.S. Supreme Court stated that "we have not had occasion to decide whether the protections of the Due Process Clause [in the U.S. Constitution] extend to discipline of a tenured public employees short of termination." Nevertheless, other lower federal courts have issued decisions indicating that disciplinary acts short of discharge, such as demotion or suspension without pay, may require some pre-disciplinary hearing before imposition of the discipline.

Therefore, while the state of the law in this area is unclear, this memorandum is to advise you that the same due process considerations outlined in the *Loudermill* decision may also be implicated when an agency takes disciplinary action by demoting or suspending a public employee with permanent status with a resulting loss of pay or benefits. In addition, if you place an employee on an unpaid, employer-initiated medical leave, the due process clause may entitle the employee to the same procedure.

Recommendation

With this in mind, the Minnesota Department of Employee Relations ("DOER") recommends that regardless of bargaining unit status, before imposing any suspensions without pay or demotions of a permanent status employee, or placing any permanent status employee on an unpaid, employer-initiated medical leave, agencies offer the affected employee an informal pre-deprivation hearing consisting of the following: 1) oral or written notice of the charges against the employee; 2) a brief explanation of the evidence supporting the charges; 3) an opportunity for the employee to present his or her side of the story; and 4) after hearing the employee's side of the story, the decision maker may withdraw, reduce, or impose the proposed discipline or action. While there is no legal right to Union representation at this meeting, you should permit the Union representative to attend if requested by the employee. This is contractually required for discharge and we recommend it for suspensions and demotions.

We believe that, in most cases, providing such an opportunity for the employee to be heard prior to taking the personnel action will not result in undue delay. If, however, an agency opts not to provide a hearing before the action because it believes that any delay may threaten the health or safety of the employee, other employees, or the public, we recommend that a hearing be held promptly after the suspension, demotion, or placement on leave.

At this time, DOER does not intend to incorporate into the various labor contracts the *Loudermill* procedure for these circumstances.

If you have any questions regarding anything in this memo, please contact me or your Labor Relations Bureau contact person.

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