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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

APPEAL NO.: WD 79897

GRAYLAND NOWDEN

Appellant,

v.

DIVISION OF ALCOHOL & TOBACCO, ET AL.

Respondents.

On Appeal From the Circuit Court of Cole County, Missouri
Case No.: 14AC-CC00088

APPELLANT'S AMENDED BRIEF

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JURISDICTIONAL SUMMARY

This appeal involves the question of whether Respondents were entitled to a judgment as a matter of law on summary judgment because Appellant Nowden failed to exhaust his administrative remedies, and whether Appellant Nowden is entitled to a judgment as a matter of law on his Motion for Summary Judgment for violations of his rights under Policy G-2 and his due process rights under the Missouri and United States Constitutions.

Notice of appeal to this Court from the Cole County Circuit Court was timely filed on July 22, 2016. [**L.F.** p. 170] The Cole County Circuit Court lies in the territorial boundaries of the Western District Court of Appeals. Mo. Rev. Stat. §477.070 (2004) The issue of whether §311.620.4 RSMo is unconstitutional raises the issue on appeal that is within the exclusive jurisdiction of the Missouri Supreme Court. However, Respondent's interpretation of §311.620.4 RSMo is obviously unconstitutional, and probably does not present a colorable claim for refusing to provide procedural due process to Nowden. Appellant believes it likely that this Court has jurisdiction of this appeal pursuant to its general appellant jurisdiction, as more particularly set forth Article V, Section 3 of the Missouri Constitution, as amended.

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STATEMENT OF FACTS[1]

Prior to October 1, 2013, Petitioner was employed as a special agent with the Missouri Division of Alcohol & Tobacco Control ("Division") of the Missouri Department of Public Safety. [**L.F.** p. 44 & 48] Nowden could only be terminated from his position for cause. [**L.F.** p. 44 & 49]

On July 10, 2013, Division employee Keith Hendrickson met with Nowden as part of an investigation into Nowden's possible interest in a liquor establishment and other violations of employee policies. [**L.F.** p. 91 and 92] Hendrickson prepared an investigative report and hand delivered it to Nowden on September 26, 2013. Nowden was given the opportunity to submit a response to the investigation within 72 hours. Nowden did not submit a response to the investigation. [**L.F.** p. 90]

On October 1, 2013, Nowden was, for the first time, notified that he was being terminated by a termination letter from Lafayette Lacy, the Division Director for the Division of Alcohol and Tobacco Control. The letter stated that Nowden's termination was effective that day, October 1, 2013. [**L.F.** p. 58] The letter further stated in part:

> "Section 311.620.4 provides that any agent of the Division of Alcohol and Tobacco Control who shall violate the provisions of Chapter 311 shall be immediately discharged. Pursuant to that provision, and for the good of the Department, you are hereby terminated effective October 1, 2013.

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[1] Throughout this Brief, Appellant Nowden will make use of the following abbreviation: L.F. – Legal File

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You have the right to appeal your termination to Department Director Jerry Lee as set out in Missouri Department of Public Safety Policy G-2, a copy of which is attached." [**L.F.** p. 59]

The rules, properly promulgated by Respondent, Missouri Department of Public Safety, include Policy G-2. [**L.F.** p. 44 & 49] Respondent is required by law to afford its regular employee such as Petitioner Nowden the rights conferred by Policy G-2. [**L.F.** p. 44 & 49]

The Department of Public Safety Policy G-2 provides:

"GENERAL: All adverse action taken against any applicable employee will be documented in writing and a copy given to the employee <u>prior</u> to any form of discipline being imposed. In all given instances where the proposed action is suspension, demotion or dismissal, the employee shall be given the opportunity to appeal in writing to the department director, as outlined in this policy <u>prior</u> to the action being imposed. During this appeal process, and if determined by the appointing authority proposing the action to be in the best interest of the work environment, the employee shall be suspended <u>with pay</u>." [**L.F.** p. 76]

According to Policy G-2, a "written report" is prepared by the Division Director, (here Lafayette Lacy), setting forth the charges against the employee and stating the recommended discipline so that the employee is notified of the charges and the basis for the charges prior to the imposition of discipline. This requirement specifically applies to employees of the Division of Liquor Control. [**L.F.** p. 77] The Division Director, (here

Lafayette Lacy), is given authority to investigate and make recommendations concerning discipline. [**L.F.** p. 79]

The written report is to be given to the employee and discussed with the employee. At that time, the employee is advised of his appeal rights, and a notification of the recommended disciplinary action is to be acknowledged by the employee. [**L.F.** p. 80]

When the employee receives the written report recommending disciplinary action, he has two options:

A. "If the employee concurs with the recommended disciplinary action and does not wish to appeal the matter, the employee may sign a waiver of the right to appeal. The right to appeal is forfeited if management personnel do not receive the Application for Appeal within seven (7) calendar days. In either case, the recommended disciplinary action would be imposed as determined by management."

B. If the employee wishes to appeal the recommended disciplinary action, the employee shall have seven (7) calendar days from the official date on the Notification of Disciplinary Action to submit an appeal... Additionally, if the employee has not previously submitted a written response thoroughly addressing the issues and allegations, the response will be submitted within ten (10) calendar days from the official date of the application for appeal form. Appeal forms and any related reports will be immediately forwarded through channels via the Division Director to the Personnel Administrator of the Department of Public Safety." [**L.F.** p. 80]

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When the Director of the Department of Public Safety receives the appeal, the Director has four options: first, the Director may request additional information; second, the Director may feel that the recommended disciplinary action is not appropriate or is excessive and may attempt resolve issue through an informal hearing; third, the Director may concur with the recommended disciplinary action and convey that decision in writing to the employee. That decision is final and no further appeal is available through the Department of Public Safety.

Fourthly, the Director, in his discretion, may convene a board to hear the application for appeal pursuant to Section 536 RSMo. At the completion of the hearing, the board will present its findings to the Director of Public Safety, and the Director will review the recommendation and issue a final decision in writing. That decision will be final and may be appealed pursuant to Section 536 RSMo. [**L.F.** p. 81-82]

On October 10, 2013, Nowden submitted an Application for Appeal. [**L.F.** p. 23] Nowden filed a Complaint with the Administrative Hearing Commission (hereinafter AHC) on November 1, 2013, after receiving no response to his appeal. [**L.F.** p. 27 & 28] On November 4, 2013, general counsel for the Department of Public Safety notified Nowden that his appeal was untimely and would not be considered. [**L.F.** p. 23] On November 27, 2013, Respondent filed a Motion to Dismiss Nowden's complaint with the AHC. [**L.F.** p. 28]

On January 28, 2014, the AHC issued its Decision stating that it lacked jurisdiction to hear Nowden's appeal. [**L.F.** p. 25] The AHC noted that Nowden was not a merit system employee, and therefore the AHC had no jurisdiction to hear the appeal.

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[**L.F.** p. 23] The AHC further noted that non-merit agencies may choose to adopt the provisions of Chapter 36.390 RSMo with respect to a merit system disciplinary procedure, or they can adopt "substantially similar" procedures. However, the AHC decided that such procedures need not apply to law enforcement agencies and that Nowden's employer was a law enforcement agency. [**L.F.** p. 24]

On February 21, 2014, Nowden filed his Petition for Review Under Chapter 536 RSMo. [**L.F.** p. 12]. In that Petition, Nowden sought review of the Decision of the AHC under Chapter 536.110 RSMo and §536.150 RSMo. [**L.F.** p. 16 & 18] Nowden argued that his termination in violation of Policy G-2 was a nullity because it violated his right to due process of law, and entitled him to reinstatement. [**L.F.** p. 18 & 19]

Petitioner moved for Summary Judgment on Count II of his Petition. [**L.F.** p. 3] After briefing, the ruling on Petitioner's Motion for Summary Judgment was deferred so that Petitioner could file an Amended Petition. [**L.F.** p. 4] The parties subsequently filed briefing with the trial court with respect to Petitioner's Amended Petition for Review Under Chapter 536 RSMo. The court ultimately entered its Order on April 14, 2015 holding that, among other things, Respondent's review procedures did not allow for immediate termination, but contemplate suspension with pay so that due process can be provided.

> "Respondent failed to comply with its own procedures by, among other actions, failing to provide notice prior to the imposition of discipline and under the facts of this case rendering the 7 day time limit set forth in Policy (G-2) to be constitutionally insufficient. Petitioner is entitled to

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judicial review of Respondent's decision to determinate his employment as guaranteed by the Missouri and United States Constitutions. Respondent by its failure to comply with its own policies thus waived the right to demand exhaustion as same is deemed fruitless under the facts of the instant action. Because there is no administrative record to review, Petitioner is entitled to de novo review of his termination." [**L.F.** p. 5-6]

On May 6, 2015, Nowden filed his Second Amended Petition for Injunctive Relief and Non-Contested Case Review Under Chapter 536.150. Petitioner plead that Respondent failed to give him notice and a hearing which violated Nowden's right to pre-deprivation due process of law guaranteed by Policy G-2, the Missouri Constitution and the US Constitution. [**L.F.** p. 45] Nowden plead that he is entitled to reinstatement to his employment, or payment of his salary, which he had prior to October 1, 2013, pending a hearing to decide whether there is cause to terminate Nowden's employment. [**L.F.** p. 45] Petitioner alleged that he suffered irreparable harm because of Respondents failure to provide him with his constitutionally protected due process pre-deprivation rights. He requested an injunction requiring Respondents to reinstate and/or pay the salary of Nowden. [**L.F.** p. 46]

The Department subsequently filed its Motion for Summary Judgment alleging that Nowden was not entitled to any procedural due process because he was terminated for having violated §311.620.4 RSMo. [**L.F.** p. 67] The Department admitted that Petitioner was first notified and terminated by the Division Director on October 1, 2013. The Department also admitted that Policy G-2 was a properly promulgated rule, and that

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the rule gave Nowden seven days from the date he was notified of the "recommended disciplinary action" by the Division Director to request an appeal of the proposed discipline to the Department Director. [**L.F.** p. 68] However, Respondent argued: "The portion of Policy G-2 requiring the Division of Alcohol and Tobacco to provide pre-deprivation process is null and void". Respondent alleged that the null and void provision states:

> "All adverse action taken against any applicable employee will be documented in writing and a copy given to the employee prior to any form of discipline being imposed. In all given instances where the proposed action is suspension, demotion or dismissal, the employee shall be given the opportunity to appeal in writing to the department director, as outline in this policy prior to the action being imposed. During this appeal process, and if determined by the appointing authority proposing any action to be in the best interest of the work environment, the employee shall be suspended with pay."

Respondent's position on summary judgment was that §311.620.4 supersedes Policy G-2 in that it provides for immediate discharge of employees such as Nowden. The Department argued that in order for Nowden to have been given the pre-deprivation due process described in Policy G-2, the Department would have to violate the mandates of §311.620.4. [**L.F.** p. 70 & 71] "The provision of G-2 upon which Petitioner relies, therefore, is null and void." [**L.F.** p. 71] The trial court granted the Department's Motion for Summary Judgment. The trial court held that Nowden's failure to exhaust his administrative remedies deprived the court of authority to proceed. [**L.F.** p. 168]

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Prior to the entry of judgment, Nowden also filed a Motion for Summary Judgment alleging that the Department violated his due process rights because it was required by law to afford its regular employees such as Nowden the rights conferred by Policy G-2. Nowden argued that Policy G-2 specifically required that Nowden be given seven days' notice prior to the effective date of his termination. He argued that §311.620.4 did not render Policy G-2 null and void.

Nowden further argued that because he could only be terminated for cause, he had a constitutionally protected property interest, which could only be taken after notice and a hearing. [**L.F.** p. 55] There is no dispute that the Department did not give Nowden any notice of the proposed disciplinary action or a hearing prior to his termination. Nowden argued that he was entitled to a judgment as a matter of law reinstating him to his position as special agent with the Department. [**L.F.** p. 56]

STANDARD OF REVIEW

Review of a grant of summary judgment by an appellate court is essentially *de novo*. *Lawrey v. Reliance Insurance Co.,* 26 S.W.3d, 857, 860 (Mo. App. W.D. 2000). The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the Circuit Court when determining its appropriateness. *Id.*

Determination of the propriety of summary judgment is purely an issue of law, founded on the record submitted. *Id.* As such, an appellate court need not defer to the Circuit Court's Order granting summary judgment. *Id.* (citing *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d, 371, 376 (Mo. banc 1993)). A grant of summary judgment will be upheld on appeal only if: "(1) there are no genuine disputes of material fact, and (2) the movant is entitled to judgment as a matter of law." *Lawrey,* 26 S.W.3d, at 860 (citing *ITT Commercial Fin.,* 854 S.W.2d, at 377).

In considering appeals from summary judgments, this court reviews the record before the trial court in the light most favorable to the party against whom judgment was entered. *Id.* (citing *ITT Commercial Fin.,* 854 S.W.2d, at 376). The court is to accord the non-movant the benefit of all reasonable inferences from the record. *Id.*

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POINTS RELIED ON

POINT I. The trial court erred in granting Respondents' Motion for Summary Judgment based on an alleged failure to exhaust administrative remedies because failure to exhaust administrative remedies is not required in a case where the issue is the validity of a rule, or the constitutionality of a statute, and where, as in this case, there are no facts in dispute.

1. ***Farm Bureau Town and Country Insurance Company of Missouri vs. Angoff,* 909 S.W. 2d, 348 (Mo banc 1995)**
2. ***Nicolai v. City of St. Louis,* 762 S.W.2d, 426 (Mo banc 1988)**
3. **Department of Public Safety Policy G-2**
4. **Section 311.620.4 RSMo**

POINT II. The trial court erred in dismissing Petitioner's case for failure to exhaust administrative remedies because Petitioner had no opportunity to exhaust his administrative remedy, in that Respondent's rules allowed Petitioner seven days to appeal prior to the effective date of the discipline, and Petitioner was disciplined on the day he got notice.

POINT III. The trial court erred in dismissing Petitioner's Petition for failure to exhaust administrative remedies, because in order for there to be a valid administrative remedy there must be the right to a formal hearing, and in our case the administrative remedy was inadequate because under Policy G-2 Nowden had no right to a hearing.

1. **Department of Public Safety Policy G-2**

2. ***Farm Bureau Town and Country Insurance Company of Missouri vs. Angoff,*** **909 S.W. 2d, 348 (Mo banc 1995)**

3. ***Zowzincski v. City of Springfield*, 875 S.W. 2d, 905 (Mo banc 1994)**

POINT IV. The trial court erred in granting Respondent's Motion for Summary Judgment for Nowden's failure to exhaust administrative remedies because there is no provision in Respondent's rules that would allow review of the Division Director's decision to immediately terminate an employee pursuant to §311.620.4 RSMo, in that Respondent's rules only provide for review by the Department Director of the Division Director's recommendation of discipline, and here there was no recommendation of discipline for Nowden to appeal.

POINT V. The trial court erred in denying Petitioner's Motion for Summary Judgment because Petitioner was entitled to a judgment as a matter of law, in that he had rights to pre-deprivation due process under Policy G-2, the Missouri Constitution, and the United States Constitution, and there was no dispute of fact that Respondent terminated Petitioner on the same day it gave him the notice of discipline and provided no opportunity for any kind of hearing.

1. ***Division of Family Services vs. Cade,*** **939 S.W.2d, 546 (Mo. App. W.D. 1997)**

2. ***Conesco Finance Servicing Corp. v. Missouri Department of Revenue,*** **195 S.W.3d, 410 (Mo. banc 2006)**

3. ***McCall v. Goldbaum,*** **863 S.W.2d, 640 (Mo. App. 1993)**

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ARGUMENT

POINT I. The trial court erred in granting Respondents' Motion for Summary Judgment based on an alleged failure to exhaust administrative remedies because failure to exhaust administrative remedies is not required in a case where the issue is the validity of a rule, or the constitutionality of a statute, and where, as in this case, there are no facts in dispute.

1. ***Farm Bureau Town and Country Insurance Company of Missouri vs. Angoff,* 909 S.W. 2d, 348 (Mo banc 1995)**
2. ***Nicolai v. City of St. Louis,* 762 S.W.2d, 426 (Mo banc 1988)**
3. **Department of Public Safety Policy G-2**
4. **Section 311.620.4 RSMo**

"Final decisions, findings, rules and orders" of an administrative agency are subject to review as provided by law." *Farm Bureau Town and Country Insurance Company of Missouri vs. Angoff,* 909 S.W. 2d, 348 (Mo banc 1995) The exhaustion requirement assures finality, agency efficiency, and that an adequate record for judicial review will be developed. *Id* at 352.

There is an exception to the exhaustion requirement where the administrative remedy is inadequate. *Farm Bureau Town and Country Insurance Company Of Missouri, v. Jay Angoff*, 909 S.W.2d, 353 (Mo banc 1995). When the issue is a constitutional challenge to a statute, exhaustion of administrative remedies is not required. *Id*. A similar exception applies when the only issue in the case is whether a city ordinance is invalid. *Nicolai v. City of St. Louis,* 762 S.W.2d, 426 (Mo banc 1988)

Section 536.100 RSMo provides judicial review of a contested case, but further provides: "... nothing in this Chapter contained shall prevent any person from attacking any void order of an agency at any time or in any manner that would be proper in the absence of this section." In Petitioner's Second Amended Petition, he alleged his termination was void on constitutional grounds and sought injunctive relief to enforce Respondent's Policy G-2 and the constitutionally required due process. [**L.F.** p. 44]

Respondent admitted that Policy G-2 was a rule properly promulgated by the Department of Public Safety and that the Department was required by law to afford employees such as Nowden the rights conferred by Policy G-2. [**L.F.** p. 62] The Department further admitted that Nowden could only be terminated for cause. [**L.F.** p. 62] Respondent admitted that Policy G-2 required written notice of discipline prior to discipline being imposed. Respondent admitted that Nowden was not given written notification until October 1, 2013, the day he was terminated. [**L.F.** p. 110] The relevant facts are not in dispute.

Respondent's Motion for Summary Judgment argued that Policy G-2 was null and void because it was in conflict with §311.620.4 RSMo. Respondent's argument on summary judgment was that Nowden did not have any administrative remedy that afforded him any due process of law. According to Respondent, §311.620.4 authorizes Respondent to terminate employees such as Nowden immediately for any alleged violation of Chapter 311 RSMo, and relieves Respondent of providing such employees with any rights under Policy G-2 or any constitutional due process. [**L.F.** p. 69-70] The first issue therefore before the trial court was whether Policy G-2 was null and void as to

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Nowden. The second issue was whether, irrespective of Policy G-2, constitutional protections required notice and opportunity for Nowden to be heard prior to the deprivation of his job. Policy G-2 provides no post-deprivation appeal rights. Under Policy G-2, after discipline is imposed, the only appeal is pursuant to Chapter 536 RSMo. [**L.F.** p. 71-72]

In its judgment, the trial court found "questionable" the position taken by Respondent that §311.620.4 overrules Respondent's own policy requiring pre-deprivation due process. [**L.F.** p. 168] The trial court was correct. Policy G-2 is a properly promulgated rule of the Department of Public Safety, and has the force and effect of law. It is undisputed that Nowden could only be terminated for cause. That being the case, he was entitled to notice and a hearing prior to the deprivation of a constitutionally protected property interest. Policy G-2, at least in part, provides that protection.

Even if the legislature intended for §311.620.4 RSMo to be a "super statute" that abrogated the Missouri and United States Constitutions, that intent would be futile. The Statute can easily be read in harmony with Policy G-2. Policy G-2 governs pre-deprivation procedures for Nowden irrespective of the basis for his termination, as Respondent conceded throughout this litigation (until filing its Motion for Summary Judgment). The trial court correctly found that Policy G-2 applies to Nowden. However, the trial court is incorrect when it states in its judgment that under Policy G-2, Nowden had seven days <u>after</u> he was terminated to exercise his pre-deprivation rights. The trial court missed the boat when it found that Policy G-2 governed post-deprivation rights which Nowden failed to exhaust. According to Policy G-2, post-deprivation rights are

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governed by Chapter 536 RSMo. [**L.F.** p. 82] Under Policy G-2, the Division Director was required to issue a written report recommending some form of discipline and providing the basis therefore. That recommendation was given to the employee and if the employee decides not to appeal, the final decision imposing the recommended discipline is determined later by management. The imposition of discipline is not left to the discretion of the Department Director under Policy G-2. [**L.F.** p. 80] In our case, there is no indication that any person was involved in the decision to impose discipline other than Lafayette Lacy, the Division Director.

But even if Policy G-2 only gave Nowden seven days to appeal <u>after</u> he was terminated, the trial court overlooked Nowden's Constitutionally protected due process rights to notice and a hearing prior to his termination. Respondent does not dispute that Nowden could only be terminated for cause. To invoke the protections of procedural due process, an employee must be deprived of a property interest recognized and protected by the due process clause of the United States Constitution. *Division of Family Services vs. Cade,* 939 S.W.2d, 546 (Mo. App. W.D. 1997). The hallmark of a property interest is an individual's entitlement grounded in state law, which establishes that the employee cannot be removed except for cause. *Id.* Employees such as Nowden have a constitutionally protected property interest in their job. *Wooldridge v. Green County, MO,* 198 S.W.3d, 676 (Mo. App. S.D. 2006).

Because Nowden had a constitutionally protected property interest in his job, the trial court should have first determined the amount of pre-deprivation process due Nowden. The Missouri Supreme Court has a firm and well settled principal that if the

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state can feasibly provide notice and a hearing before deprivation of a protected interest, it generally must do so in order to minimize "substantially unfair or mistaken deprivations." *Jamison vs. Missouri Department of Social Services,* 218 S.W.3d, 288 (Mo banc 2007) citing *Zinermon vs. Burch, 494* US 113 (1990). The requirement of due process is that an individual be given an opportunity for hearing before he is deprived of any significant property interest. *Id.* Citing *Cleveland Board of Education vs. Loudermill,* 470 US 532 (1985). "If the right to notice and a hearing is to serve its full purpose then it is clear that it must be granted at a time when the deprivation can still be prevented." *Id.* Citing *Fuentes vs. Shevin*, 407 US 67 (1972).

No matter how elaborate, an investigation by a government agency does not replace a hearing. *Winegar vs. DeMoines Independent Community School District,* 20 F.3d, 895 (8th Circuit 1994). Nor does a meeting take the place of a hearing when there are no meaningful post-deprivation procedures. *Id.* In our case, the government conducted an investigation, but never gave Nowden prior notice of the proposed discipline, or an opportunity to present his side of the story to the Division Director that was planning to terminate him, or to the Director of the Department of Public Safety prior to discipline being imposed. The Division Director notified Nowden he was terminated and that he could appeal his termination and attempt to rebut his conclusion that Nowden's termination was for the good of the service. [**L.F.** p. 59] The for "the good of the service" standard is not found in Policy G-2. That standard comes from Section 36.380 RSMo which provides in pertinent part:

> "An appointing authority may dismiss for cause any employee in its division occupying a position subject hereto when he considers that such action is required in the interests of efficient administration and that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the appointing authority gives to such employee a written statement setting forth in substance the reason therefore and files a copy of such statement with the director."

This case involves what should have happened. The Division Director should have notified Nowden prior to his termination, that he proposed termination for cause, and because it was for the good of the service. Had that decision been reviewed, many options other than termination would have been available to the Department Director during the pre-deprivation appeal process, including the opportunity to be placed on leave with pay, reduced discipline, or an informal hearing with the Division Director. [**L.F.** p. 81]

The length and consequent severity of a deprivation is to be considered in determining what procedural protections are constitutionally required. *Belton vs. Board of Police Commissioners*, 708 S.W.2d, 131 (Mo. banc 1986). In our case, Respondent was terminated on October 1, 2013. There was no post-deprivation review procedure available within the Department. It took over two years to get the case through the AHC, and to get the case ready for the trial court's hearing on summary judgment. It has now been three years that Nowden has been without a job, salary or benefits. The delay

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between the deprivation and the final decision after a hearing is an important factor in assessing the impact of official action on the private interest. *Brock vs. Roadway Exp., Inc.* 481 US 252 (1987).

Respondent argued in its Motion for Summary Judgment that when a state regulation or manual conflicts with a statute the statute prevails. For this proposition, Respondents rely on *City of St. Peters vs. Roeder,* 466 S.W.3d, 538 (Mo. banc 2015). That case was one of the decisions involving the use of red light traffic cameras. The city's ordinance providing for the camera's use conflicted with state law to the extent that it prohibited the assessment of points against a driver's license where the driver was found by camera to be in violation of the speed limit. The court determined the city ordinance was invalid to the extent that it prohibited points, but could otherwise be enforced. The court determined that the ordinance, absent the severed invalid portion could not be applied retroactively to the defendant in that case. *Id* at 547. In *Roeder*, the court affirmed that a municipal ordinance would be upheld as valid "unless the ordinance is expressly inconsistent or there is irreconcilable conflict with the general law of the state." *Id* at 543. In our case, Policy G-2 is consistent with the general law of the state to the extent that it provides for pre-deprivation due process for employees who can only be terminated for cause. However, unlike as in *Roeder,* Respondent's reliance on of §311.620.4 is not consistent with state law.

According to our Supreme Court in *Jamison,* "Failure to provide a pre-deprivation hearing is acceptable only if (1) a pre-deprivation hearing would be 'unduly burdensome in proportion to a liberty interest at stake,' (2) the state is unable to anticipate the

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deprivation, or (3) an emergency requires immediate action." *Id* at 409, Citing *Zinermon,* 494 US at 132*; Bell vs. Burson,* 402 US 535 (1971) Respondents make no argument that providing Nowden with a meaningful pre-deprivation hearing would have been unduly burdensome. The deprivation was unquestionably anticipated by the state, and there was no emergency. No authority can be found to support Respondent's conduct in terminating Nowden without affording him any due process. Section 311.620.4 RSMo does not abrogate the Missouri or United States Constitutional protections available to Nowden that are clearly recognized in our case law.

Section 311.620.4 must be interpreted to provide that once pre-deprivation due process is afforded, and Nowden was given notice and an opportunity for a formal hearing, a determination could have been made by the Department Director (not the Division Director) that he violated §311.640, and Nowden could have been discharged and review pursuant to Chapter 536 would have been available. There is no reason to believe that §311.620.4 is some kind of "super statute" that overrides the Missouri and United States Constitutions. Respondent argued on summary judgment, that §311.620.4, for some reason, eliminates Nowden's constitutional due process rights; however that argument was not fully developed. If Respondent is correct, all employees of the Division are subject to immediate termination without any right to due process if there is any alleged violation by them of Chapter 311. Hopefully, on appeal we will learn why this particular statute supersedes Policy G-2, and the Missouri and United States Constitutions. Perhaps Respondent believes Chapter 311 RSMo grants it power that exceeds those powers granted to any other person or any other agency in the United States. Nowden concedes

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that Respondent has important responsibilities in the State of Missouri. However, Nowden cannot concede that the Department of Public Safety, Division of Alcohol and Tobacco has such preeminent responsibilities that it must override our constitutional rights and exercise power which the Attorney General, the Governor of the State of Missouri, and the President of the United States do not have. Nowden is now forced to speculate that Respondent believes him to have become a "double agent" who is working for the dark side, and therefore Nowden forfeited any constitutional rights he might have as a citizen of the State of Missouri or as a citizen of the United States of America. Based upon this ludicrous interpretation, Nowden could have been executed for treason upon the mere completion of the Division's investigation. There is no reason to adopt Respondent's interpretation of §311.620.4. To do so would make §311.620.4 unconstitutional.

Respondent argued on summary judgment that although Nowden was entitled to no rights under Policy G-2, and that he had no pre-deprivation due process rights, he was, nonetheless, given the investigative report outlining the accusations against him. As described above, no investigation, no matter how thorough, satisfies the right to a notice and a hearing. Respondent concedes it never notified Nowden that he was going to be terminated until the time his termination took effect. All Nowden knew at that time is that he was under investigation. He had no notice that he had a duty to respond to the investigative report until discipline was threatened against him by the Division Director. Nowden did not know that discipline was recommended until he was already terminated. That was the day he received notice. Clearly, Respondents violated Nowden's due

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process right to notice. This case is very similar to *Division of Family Services v. Cade,* 939 S.W.2d, 546 (Mo. App. W.D. 1997) where the Division of Family Services imposed discipline on an employee without giving him any pre-deprivation due process. The employee was disciplined without notice and a hearing prior to the imposition of discipline. The discipline therefore was invalid. *Id* at 555.

Unlike our case, DFS in *Cade* gave no reason why it believed it was not required to abide by the regulation requiring prior notice and an opportunity to be heard. The thrust of the decision in *Cade* was that the agency failed to provide adequate notice of the first suspension because the notice was not detailed enough to inform the employee of the allegations against him so he could defend himself. *Id*. In *Cade,* there was a second suspension for 20 days for which Cade received no prior notice, and that suspension was invalid also. The court in *Cade* did not reach the issue of whether Mr. Cade's conduct constituted grounds for discipline such that it would have justified the suspensions should proper notice have been given. The court simply held that Cade was entitled to back pay, and should DFS decide to pursue the merits of the allegations against Mr. Cade, it would have to first provide him with proper notice, as required by Missouri Statutes and by constitutional due process principals. *Id* at 556 and see also footnote 10.

In our case, Respondent's argument on summary judgment was a purely legal one; as was Petitioner's. There were no disputes of fact. Respondent alleged that Nowden was not entitled to any due process at all because of §311.620.4 RSMo. The trial court apparently agreed that Nowden was not entitled to any pre-deprivation due process under Policy G-2. But the trial court failed to address Nowden's rights to due process of law

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under the Missouri Constitution or the United States Constitution. Moreover, the question of whether Nowden failed to exhaust any administrative remedy is irrelevant to the analysis of whether Policy G-2 is a valid regulation and whether Respondent violated Nowden's constitutional rights to due process. Based on the difficulty in analyzing this case by all involved, (Policy G-2 is an aberration of state policy governing employee discipline because it does not require a hearing) it is not surprising the trial court incorrectly took the easy way out. Unfortunately, the trial court did not address the constitutional due process issue which cuts in favor of Petitioner. The Trial Court also ignored the pre-deprivation rights in Policy G-2. Respondent is not entitled to a judgment in its favor on summary judgment.

Point II. The trial court erred in dismissing Petitioner's case for failure to exhaust administrative remedies because Petitioner had no opportunity to exhaust his administrative remedy, in that Respondent's rules allowed Petitioner seven days to appeal prior to the effective date of the discipline, and Petitioner was disciplined on the day he got notice.

Based on Respondent's position in the AHC, in circuit court, the AHC Decision, and the April 14, 2015 Order of this Court, Policy G-2 applies to Nowden in all respects. Respondent argued to the AHC that Nowden was entitled to the rights conferred by Policy G-2 with respect to notice and an opportunity to be heard prior to his termination. [**L.F.** p. 22] Respondent persuaded the AHC that Policy G-2 outlines dismissal procedures that are substantially similar to those set forth in §36.390.5 RSMo.[**L.F.** p. 24]

The trial court concluded in its Order of April 14, 2015, that Respondent provided alternative procedures to Nowden and that those procedures do not allow for immediate termination. Respondent's Procedures provide for a suspension with pay so that due process can be provided, and that Respondent failed to comply with Policy G-2. (Appendix p. A1-A2)

Based upon the record before this Court, Respondents are precluded from claiming that Policy G-2 is invalid. Respondents took the position before the AHC and the trial court that Nowden was entitled to the policies and procedures provided in Policy G-2. Respondents are judicially estopped from changing the position they took before the AHC and the trial court because Respondent's position resulted in adjudication in its favor.

POINT III. The trial court erred in dismissing Petitioner's Petition for failure to exhaust administrative remedies, because in order for there to be a valid administrative remedy there must be the right to a formal hearing, and in our case the administrative remedy was inadequate because under Policy G-2 Nowden had no right to a hearing.

1. **Department of Public Safety Policy G-2**
2. ***Farm Bureau Town and Country Insurance Company of Missouri vs. Angoff,* 909 S.W. 2d, 348 (Mo banc 1995)**
3. ***Zowzincski v. City of Springfield*, 875 S.W. 2d, 905 (Mo banc 1994)**

In its judgment, the trial court appeared to view Policy G-2 as providing post-deprivation due process rights that Nowden was required to exhaust. [**L.F.** p. 168]

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Nonetheless, Policy G-2 exclusively provides pre-deprivation due process rights. [**L.F.** p. 76] Even if that were not true and Policy G-2 applies to post-deprivation appeals, had Nowden appealed within seven days of the date of his termination, he was not entitled to a hearing.

According to Policy G-2, had Nowden requested an appeal prior to the imposition of discipline, the appeal was to be sent to the Department Director in order for the Department Director to review the proposed discipline. The Department Director had four options upon receipt of an appeal request. One of those options, under Policy G-2, allowed the Department Director to concur with the proposed discipline and convey that decision in writing to the employee. That decision would have been final with no further appeal rights within the Department of Public Safety. [**L.F.** p. 81] Therefore, it cannot be said that Policy G-2 provides a right to a hearing, either for a pre-deprivation appeal or for post-termination appeal.

Because there was no right to a hearing, the exhaustion of administrative remedies would be meaningless. There was no administrative hearing guaranteed to Nowden, therefore the "remedy" available in Policy G-2 was not adequate. The administrative remedy in this case did not have to be exhausted because the procedures and other remedies available to Nowden did not provide for a formal hearing. *Strozewski v. City of* Springfield, 875 S.W. 2d, 905 (Mo banc 1994)

Technically, prior to the imposition of discipline, this was not yet an adversarial proceeding, and Nowden was not yet an aggrieved person. Nowden could not be terminated until after seven days' notice, which he never received. Review by the trial

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court of Nowden's termination was not subject to dismissal for Nowden's failure to exhaust an administrative remedy that was inadequate.

The purpose of exhausting an administrative remedy is to assure that final decisions of government agencies are reviewed as required by law. *Farm Bureau Town and Country Insurance Company of Missouri vs. Angoff,* 909 S.W. 2d, 348 (Mo banc 1995) The only way there could be a review of a final decision was that if there was a hearing and a record made. The exhaustion of administrative remedies is designed to assure that an adequate record for judicial review is developed. Because there is no reason to believe that a "record" would have been made in Nowden's case had he filed an appeal, the attempted exhaustion of the administrative remedy available in Policy G-2 would have been futile, meaningless and inadequate for judicial review. The appeal available in Policy G-2 was not a contested case. Therefore, Petitioner's claim that his termination was in violation of his rights to pre-deprivation due process of law, and in violation of Policy G-2 are not subject for dismissal for failure to exhaust administrative remedies.

POINT IV. The trial court erred in granting Respondent's Motion for Summary Judgment for Nowden's failure to exhaust administrative remedies because there is no provision in Respondent's rules that would allow review of the Division Director's decision to immediately terminate an employee pursuant to §311.620.4 RSMo, in that Respondent's rules only provide for review by the Department Director of the Division Director's recommendation of discipline, and here there was no recommendation of discipline for Nowden to appeal.

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The only rule that provides regular employees such as Nowden with an appeal is Policy G-2. Policy G-2 applies to all adverse action taken against an employee and requires that the proposed termination decision be documented in writing, and a copy given to the employee seven days prior to the discipline being imposed. Policy G-2 contemplates that an employee for which termination is recommended, may be suspended with pay. [**L.F.** p. 76] There is no provision in Policy G-2 for the appeal of discipline once it is imposed. The entire context of Policy G-2 speaks of "recommendations" for discipline. There is no right, based on the content of Policy G-2, for any employee to assert an appeal or request an appeal after they have been terminated from employment. Nowden had no administrative remedy he could exhaust, and the trial court, by dismissing Nowden's case, required him to perform a meaningless act: appeal under Policy G-2 after he was terminated. After termination, Nowden's only recourse was to appeal pursuant to Chapter 536 RSMo.

POINT V. The trial court erred in denying Petitioner's Motion for Summary Judgment because Petitioner was entitled to a judgment as a matter of law, in that he had rights to pre-deprivation due process under Policy G-2, the Missouri Constitution, and the United States Constitution, and there was no dispute of fact that Respondent terminated Petitioner on the same day it gave him the notice of discipline and provided no opportunity for any kind of hearing.

1. ***Division of Family Services vs. Cade,* 939 S.W.2d, 546 (Mo. App. W.D. 1997)**

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2. *Conesco Finance Servicing Corp. v. Missouri Department of Revenue,* 195 S.W.3d, 410 (Mo. banc 2006)

3. *McCall v. Goldbaum,* 863 S.W.2d, 640 (Mo. App. 1993)

For the reasons described above, it is undisputed that Respondent failed to provide Nowden with pre-deprivation due process as required by law. Nowden was therefore entitled to a judgment in his favor as a matter of law on his motion for summary judgment. Nowden requested, and should have been granted, a judgment reinstating him to his employment. [L.F. p. 53 and 57]

The wrong done to Nowden (the denial of due process) cannot be undone by holding a hearing to decide whether or not there was cause to discipline Nowden for violating §311.640 The remedy for the violation of Nowden's due process rights must be an award of back pay or reinstatement. *Division of Family Services v. Cade,* 939 S.W.2d, 552. Otherwise, Respondents have no obligation to provide constitutionally required due process or the procedural protections in Policy G-2. Nowden's remedy of reinstatement is consistent with the relief given in *Conesco Finance Servicing Corp. v. Missouri Department of Revenue,* 195 S.W.3d, 410, (Mo. banc 2006). In *Conesco* the court determined that the homeowner's due process rights were violated by not getting a pre-deprivation hearing. In *Conesco,* the Department of Revenue sent notice to the homeowner that the homeowner had thirty days to redeem the mobile home or an abandoned title would be issued. The homeowner argued that this allowed new title to be issued without a pre-deprivation hearing to contest whether indications of abandonment exist, and that there was no provision for a post-deprivation hearing, violating the

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homeowner's procedural due process rights. *Id* at 413. The trial court correctly entered summary judgment in favor of the homeowner and prohibited DOR from issuing the abandoned title. *Id* at 414. In *Conesco*, the homeowner did not deny that it had abandoned the home. *Id* at 415.

The facts in *Conesco* are similar to ours. In our case, Nowden lost his property interest in his job without notice or hearing. His due process rights were violated and the only way to restore his property interest is to reinstate his employment. The issue of whether there was cause to terminate Nowden is irrelevant at this juncture, just as whether the mobile home was abandoned was irrelevant in *Conesco*. The fact that Nowden did not contest the investigative report is irrelevant. The issue was whether due process rights were violated, and, if so, state action resulting from the violation should be set aside and rendered void. Even where there is a hearing proving cause for discipline, where the employee did not receive adequate notice, the employee must be reinstated. *McCall v. Goldbaum,* 863 S.W.2d, 640 (Mo. App. 1993).

In our case, Nowden could only be terminated for cause and he had a property interest in his job. So long as the property deprivation is not deminimus, due process should be afforded. The severity of the deprivation, that is, termination of employment, means procedural protections are constitutionally required. Policy G-2 provides at a minimum, that prior to termination, Nowden was to be given a written report from the Division Director setting forth the allegations and the recommended discipline, and that recommended disciplinary action was to be discussed between Nowden and the Division Director. [**L.F.** p. 80]

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Our Supreme Court has affirmed that: "the 'root' requirement of the due process clause is that a person facing deprivation of property receive notice and an opportunity for a hearing appropriate to the nature of the case." *Belton v. Board of Police Commissioners,* 708 S.W.2d, 131 (Mo banc 1986); citing *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985). The court in *Loudermill* held that so long as there was a prompt post-deprivation evidentiary hearing available, due process requires only that the employee be given notice of the charges, an explanation of the employer's evidence against the employee, and an opportunity to present his side of the story prior to the deprivation. *Id.* In our case, there was no post-deprivation evidentiary hearing that the Department made available to Nowden. Therefore, under *Loudermill,* additional pre-deprivation due process was needed. Analysis of the competing interests at stake in this case confirms that Nowden was not provided with the constitutionally required pre-deprivation procedures required in *Loudermill.* Because of this due process violation, Nowden was entitled to a judgment as a matter of law because the facts are not in dispute.

CONCLUSION

The judgment of the trial court must be reversed because there is no dispute that Respondent failed to provide Nowden with pre-deprivation due process as required by Policy G-2. Policy G-2 affords employees such as Nowden no post-deprivation employment rights, and Policy G-2 does not guarantee a hearing. After his termination, there was no remedy for Nowden to exhaust. The remedy available in policy G-2 is not a contested case, therefore, exhaustion of an administrative remedy, even if one was available, was not required. Respondent violated Nowden's Constitutional right to due

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process when it terminated Nowden before he received notice and a hearing. Nowden must be reinstated to his employment because he is entitled to a judgment as a matter of law on his motion for summary judgment.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that on this 22nd day of November, 2016, the foregoing amended brief was submitted to the Western District Appellant Court and it fully complies with the limitations contained in Missouri Supreme Court Rule 84.06 that it contains 8,108 words, excluding the cover and certification as determined by Microsoft Word software and that the following attorney of record received a copy of this amended brief via electronic court filing:

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