In the Missouri Court of Appeals
Eastern District
DIVISION THREE

ELIZABETH SMITH,	)	No. ED109423
Appellant,	)	Appeal from the Circuit Court of the City of St. Louis
vs.	)	Case No. 1922-CC11551
CITY OF ST. LOUIS,	)	Honorable Joan L. Moriarty
Respondent.	)	Filed: September 14, 2021

Elizabeth Smith appeals the judgment entered by the Circuit Court of the City of St. Louis affirming the decision of the St. Louis City Civil Service Commission to suspend her from her employment for 15 days. Because the Commission failed to adhere to the procedural safeguards contained in its written submission process, thus violating Smith's due process rights, we reverse the Commission's decision.

Factual and Procedural Background

The City employed Smith as a paramedic in the St. Louis Fire Department. In July 2018, Smith submitted Family/Medical Leave forms to the City's Fire Division Medical Officer. Upon seeking clarification about the content of Smith's forms, the Medical Officer discovered that the doctor who purportedly signed the forms on July 30, 2018 had left his local medical practice and had not worked in Missouri for five months.

The St. Louis Fire Department Disciplinary Review Board conducted a pre-disciplinary review for Smith. During the review, Fire Chief Dennis Jenkerson advised Smith of the charges against her, gave her an explanation of the evidence, and gave her an opportunity to present any disputed facts or mitigating circumstances. Smith maintained that the physician's signature on her medical leave forms resulted from a clerical error in the physician's office, and that she did not notice the error before submitting the forms. The Disciplinary Review Board found that Smith's actions violated the Division of Fire and Fire Prevention rules and regulations that: (1) prohibit the making of untruthful and inaccurate reports and the making of misleading statements with intent to deceive; (2) require prescribed forms be completely and accurately filled out; and (3) prohibit the filing of false reports. The Disciplinary Review Board suspended Smith for 96 hours. The City's Personnel Department informed the Disciplinary Review Board that Smith's suspension must be expressed in terms of calendar days, not hours, and that the hearing must be conducted again. Therefore, Chief Jenkerson held the hearing again, reviewed the same information, and imposed a suspension of 15 calendar days encompassing eight 12-hour shifts within those 15 days.

Smith appealed to the City's Civil Service Commission. The Commission sent Smith a letter dated December 11, 2018 describing the appeal process, which stated in pertinent part:

> If you wish to proceed with your appeal before the Civil Service Commission, please indicate with a check mark in **<u>one</u>** of the boxes below *which type of hearing you are requesting* and return the form within ten (10) calendar days to the Civil Service Commission if you wish to proceed with your appeal.
>
> *The Civil Service Commission recommends and encourages the use of the written submission process.* It believes it is an efficient and effective method to get issues before the Commission.
>
> Failure to respond, marking more than one box or failing to mark any box shall result in you waiving your right to an evidentiary hearing before a hearing officer and your appeal will be handled through the written submission process.

(Italicized emphases added). At the bottom of the letter were three boxes identifying the options available to Smith, and the letter instructed her to choose one: (1) written submission; (2) evidentiary hearing before a hearing officer; or (3) declining to proceed with the appeal. Smith marked the box for the written submission option, and signed, dated, and printed her address on the form. Nowhere did the letter state that Smith waived her due process rights if she chose the recommended written submission process "type of hearing."

Following Smith's election to proceed via the written submission process, the Commission sent Smith a copy of this process on February 1, 2019. Section III.a. of the Commission's written submission process states in pertinent part that:

> The Appointing Authority will be required to file the initial submission in connection with an appeal. Said submission shall be filed within twenty-one (21) calendar days of [the] date of the Notice of Institution of Case received from the Civil Service Commission. The Appointing Authority's submission *should* include the following:
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> 1. A notarized statement from the Appointing Authority or his/her designee setting forth the specific reasons for the action which is the subject matter of the appeal.
> 2. Copies of any pertinent department/division work rules, standards of performance or regulations pertinent to the disciplinary action . . . including rules, standards or regulations allegedly violated by the appellant.
> 3. Notarized statements from witness and/or individuals (including but not limited to supervisors) with personal knowledge of the basis for the disciplinary action . . . being appealed.

(Emphasis added). Chief Jenkerson filed the initial submission statement in support of the 15-day suspension; however, the statement was *not* notarized. While Chief Jenkerson included internal emails, request for discipline forms, and memoranda from the paramedic supervisor, EMS deputy chief, and medical officer to support his submission, he provided no sworn statements from these or other witnesses. Smith submitted her notarized response under Section III.b. of the

written submission process,[1] raising the issue that Chief Jenkerson's statement was not notarized. Chief Jenkerson then filed his rebuttal, which was not notarized, and finally, Smith filed her reply, again pointing out that the appointing authority's statements were not notarized.

The Commission found Smith was suspended from her job for good and just cause, and upheld the 15-day suspension. Smith then filed a petition for judicial review in the Circuit Court of the City of St. Louis. The circuit court found that "[w]hile not notarized, Chief Jenkerson's statement was supported by ample evidence." The court concluded, *inter alia*, that the Commission's decision was supported by competent and substantial evidence upon the whole record, and was not made upon unlawful procedure or without a fair trial. The court affirmed the Commission's decision suspending Smith for 15 days. Smith appeals.

Standard of Review

We review the decision of the Civil Service Commission rather than the circuit court's decision. Section 536.140.2 RSMo. (2016);[2] *Stone v. Mo. Dep't of Health and Senior Services*, 350 S.W.3d 14, 19 (Mo. banc 2011). The Commission is an "agency" for purposes of the Missouri Administrative Procedure Act ("MAPA"), and so is required to follow the MAPA's procedure. Sections 536.010–536.150; *Sapp v. City of St. Louis*, 320 S.W.3d 159, 164 (Mo. App.

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[1] Section III.b. states in pertinent part:

> A complete copy of the Appointing Authority's submission will be forwarded to the Appellant. The Appellant shall respond to the Appointing Authority's submission within twenty-one (21) calendar days. The Appellant's submission should include the following:
>
> 1. A notarized statement from the Appellant setting forth the specific reasons for appealing the decision.
> 2. Copies of any pertinent department/division work rules, standards of performance or regulations pertinent to the disciplinary action . . . including rules, standards or regulations.
> 3. Notarized statements from witness and/or individuals (including but not limited to supervisors) with personal knowledge of the basis for the disciplinary action . . . being appealed.

[2] All statutory references are to RSMo. (2016).

E.D. 2010). We review whether the agency action: (1) is in violation of constitutional provisions; (2) is in excess of the statutory authority or jurisdiction of the agency; (3) is unsupported by competent and substantial evidence upon the whole record; (4) is, for any other reason, unauthorized by law; (5) is made upon unlawful procedure or without a fair trial; (6) is arbitrary, capricious or unreasonable; or (7) involves an abuse of discretion. Section 536.140.2; *Stone*, 350 S.W.3d at 19-20.

Discussion

Smith claims the circuit court erred in affirming the Commission's decision to suspend her for 15 days from her job as a paramedic with the City's Division of Fire and Fire Prevention. Smith contends that the Commission's decision was made upon an unlawful procedure and without a fair trial, and is unsupported by competent and substantial evidence. Specifically, Smith complains that Chief Jenkerson failed to provide any verified evidence as required under the Commission's written submission process.

Smith argues that if a notarized statement from the appointing authority is required under the written submission process, then we must reverse her 15-day suspension because Chief Jenkerson failed to provide the required notarized statement. On the other hand, she argues, if the written submission process does not require a notarized statement, then the process itself is generally defective under Missouri statute and case law, and Smith's suspension must be reversed.

Smith's proceeding before the Commission is a contested case. The MAPA defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Section 536.010(4) RSMo.; *450 N. Lindbergh Legal Fund, LLC v. City of Creve Coeur*, 477 S.W.3d 49, 52 (Mo. App. E.D.

2015). "Contested cases provide the parties an opportunity for a formal hearing with the presentation of evidence, including sworn testimony and cross-examination of witnesses, and contested cases require written findings of fact and conclusions of law." *Id*. The administrative body does not have the discretion to determine whether a proceeding is a contested or non-contested case. *Sapp*, 320 S.W.3d at 162. Rather, the determination is made as a matter of law. *Id*. "The term 'hearing,' as used in section 536.010(4), means a proceeding at which a 'measure of procedural formality' is followed." *Id*. at 163.

Where the State grants an employee a right or expectation that adverse action will not be taken against the employee except upon the occurrence of specified behavior, the determination of whether such behavior occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed. *Id*. Suspension for cause, like termination of employment, implicates constitutionally-protected property interests. *Id*. at 164. Because Smith's suspension involved a constitutionally-protected property interest, she was entitled to have her case adjudicated as a contested case. *Id*. Consequently, the Commission was obligated to provide Smith with a hearing—a proceeding at which a measure of procedural formality is followed—to protect her right to due process, and Smith had a right to challenge her suspension via a hearing with heightened procedural safeguards because her procedural due process rights were implicated. *Id*.

Smith's right to a measure of procedural formality and heightened procedural safeguards are essential to our analysis in this case. Smith waived a formal evidentiary hearing before a hearing officer, and opted to use the Commission's written submission process, which the Commission "recommends and encourages," characterizing it as a "type of hearing." The City acknowledged at oral argument that the Commission did not inform Smith it would consider her

to have waived all procedural safeguards and her due process rights by choosing the written submission process. The City argued the lack of disclosure in this regard is of no consequence because the information is available online. We disagree. Neither the Civil Service Commission's Rule XIII, governing appeals, hearings, investigations, and reviews, nor its written submission process indicates that an employee who chooses the written submission process waives the procedural safeguards imposed by due process. "Waiver requires an intentional relinquishment or abandonment of a *known right or privilege,* and no one can be bound by waiver unless it was made with full *knowledge* of the rights intended to be waived." *Fed. Nat'l Mortgage Ass'n v. Pace*, 415 S.W.3d 697, 704 (Mo. App. E.D. 2013)(emphases in original).

Despite her waiver of a formal evidentiary hearing before a hearing officer, Smith was entitled to the procedural safeguards provided by the written submission process. These safeguards include the provisions stating that the appointing authority "should" provide "[a] notarized statement from the Appointing Authority or his/her designee setting forth the specific reasons for the action which is the subject matter of the appeal." Civil Service Commission Written Submission Process, effective May 17, 2012, Section III.a.1. Further, "the Appointing Authority's submission "should" include copies of pertinent rules, standards, or regulations, including those allegedly violated by the employee, as well as notarized statements from individuals with personal knowledge of the basis of the disciplinary action. *Id*. at Sections III.a.2 - 3. Here, no sworn statements from the paramedic supervisor, EMS deputy chief, medical officer, or other witnesses were provided. Other safeguards included in the written submission process, but not at issue in this appeal, are a specific order and timing for submission of information by each party (section III); the right to request issuance of subpoenas (section III.e.);

strictly enforced time frames for submissions (section III.f.); and the right for a party to rebut additional information requested by the Commission (section IV).

Our Court has previously addressed the Commission's written submission process. In *Sapp v. City of St. Louis*, a City employee was suspended for four days. 320 S.W.3d at 161. This Court determined "Sapp had a right to a hearing with heightened procedural safeguards to challenge his suspension because his procedural due process rights were implicated." *Id*. at 164. The Commission, however, had not offered Sapp any opportunity for such a hearing, instead informing him that review of his suspension would be based on the Commission's written submission process.[3] *Id*. at 165. We concluded that Sapp's right to due process was violated because he received no opportunity for a contested case hearing. *Id*.

Here, unlike in *Sapp*, the Commission offered Smith the opportunity for an evidentiary hearing before a hearing officer, and she affirmatively chose to use the written submission process instead, which the Commission "recommends and encourages," characterizing it as a "type of hearing." The Commission includes certain procedural safeguards in its written submission process to fulfill the requirements for contested cases that otherwise would be provided under Chapter 536 and to provide due process to those with a constitutionally-protected property interest in their employment. These safeguards include provisions that statements from the appointing authority and witnesses should be notarized, the appointing authority should set forth the specific reasons for the disciplinary action, and copies of pertinent rules, standards, and regulations should be attached, including those that the employee allegedly violated. The Commission cannot simply decide those safeguards are optional and dispense with them when an

[3] Following this Court's *Sapp* decision, the Commission revised its written submission process.

employee's due process rights are implicated.

The written submission process states in relevant part:

> The Appointing Authority will be required to file the initial submission in connection with an appeal. Said submission shall be filed within twenty-one (21) calendar days of [the] date of the Notice of Institution of Case received from the Civil Service Commission. The Appointing Authority's submission *should* include the following:
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> 1. A notarized statement from the Appointing Authority or his/her designee setting forth the specific reasons for the action which is the subject matter of the appeal.
> 2. Copies of any pertinent department/division work rules, standards of performance or regulations pertinent to the disciplinary action . . . including rules, standards or regulations allegedly violated by the appellant.
> 3. Notarized statements from witness and/or individuals (including but not limited to supervisors) with personal knowledge of the basis for the disciplinary action . . . being appealed.

Section III.a. (Emphases added). The City relies on caselaw about the permissive and mandatory nature of the words "may" and "shall," respectively, to argue the word "should" merely suggests rather than requires notarized statements. However, the nature of the words "may" and "shall" are not at issue in this case. The nature of the word "should" is at issue, and as used here, we disagree with the City's interpretation. "Should" is the past tense of "shall." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/should?utm_campaign= sd&utm_medium =serp&utm_source=jsonld (last visited Sept. 7, 2021). It is also "used in auxiliary function to express obligation, propriety, or expediency" and "to express what is probable or expected." *Id*. Thus, "should" might be used to express either a mandate or to express a suggestion or expectation.

Similarly, Missouri courts have found the word "should" to convey either an obligation or a suggestion, depending on a logical reading of the whole text in which "should" is used. *See, e.g., Weinstock v. Holden*, 995 S.W.2d 408, 409-10 (Mo. banc 1999)("Our predecessors thought it sufficient to use the word 'should,' leaving to the sound judgment of

those who followed to determine whether [a judge's] recusal was required in a particular case."); *Bd. of Educ., Mt. Vernon Schools v. Shank*, 542 S.W.2d 779, 782 (Mo. banc 1976)("When considered as a whole we think the regulation [regarding corporal punishment procedure] must be said to be mandatory."); *Piercy v. Missouri State Highway Patrol*, 583 S.W.3d 132, 141 (Mo. App. W.D. 2019)("While 'should' is the past tense of ['']shall['], in this context it is proper to interpret it as an expectation rather than an imperative."); *Burgess v. Ferguson Reorganized Sch. Dist., R-2*, 820 S.W.2d 651, 655 (Mo. App. E.D. 1991)(logical reading of school board policy about leaving students unattended leads to conclusion that use of "should" does not negate mandatory nature of policy); *Westbrook v. Bd. of Educ. of the City of St. Louis*, 724 S.W.2d 698, 701-02 (Mo. App. E.D. 1987)(concluding that where regulation stated teachers "should use reasonable care to look out for the safety of students during a trip," logical reading leads to inference that Board was informing teachers they were *required* to take reasonable care for safety of students and not simply that Board wanted teachers to take reasonable care or preferred they do so).

We conclude that a logical reading of the Commission's entire written submission process, particularly section III, which sets forth the procedure in detail, requires the appointing authority's statement be notarized. Even if "should" as used here were interpreted to mean that submission of a statement by the appointing authority is suggested, not required, when the appointing authority submits a statement, the statement must be notarized or otherwise verified. Adherence to due process is mandatory, not merely optional or suggested, when an employee's constitutionally-protected property interest in his or her job is implicated. In addition, if we were to determine that "should" in the context of section III.a. is merely a suggestion, then the Commission's written submission process would merely suggest that the appointing authority set

forth specific reasons for the employee's discipline. Likewise, the written submission process would merely suggest that the appointing authority attach the relevant work rules, standards, or regulations to its statement, including those allegedly violated by the employee. Such an interpretation cannot prevail.

Our Court has already determined that an employee must be informed of the specific reasons for disciplinary proceedings. We have rejected the City's disciplinary action taken against an employee without providing notice of the specific reasons for the action. *Schwartz v. City of St. Louis*, 274 S.W.3d 509, 511 (Mo. App. E.D. 2008). In *Schwartz*, the City notified Schwartz that disciplinary proceedings were initiated against him because he "acted in an inappropriate and abusive manner toward [his] subordinate in violation of division work rules." *Id*. We concluded the City's notice lacked the necessary specificity to permit Schwartz to present a meaningful defense, and so the Commission's decision was made upon unlawful procedure and without a fair hearing. *Id*. Stated somewhat differently, this Court held that due process *requires* notice to the employee of the *specific* reasons for the disciplinary procedure. Thus, our Court has already held that providing the employee with the specific reasons for disciplinary action is not merely a suggestion as the City argues.

We also find statutory support for our conclusion. We recognize section 536.063(3) provides that formality of the contested case procedure may be waived by mutual consent of the parties. Here, Smith objected at the first opportunity that Chief Jenkerson's statement was not notarized, so it cannot be said there was mutual consent to the use of unsworn statements against Smith. Further, as discussed earlier, Smith did not waive the procedural safeguards meant to protect her due process rights because waiver requires the intentional relinquishment or abandonment of a known right, which was lacking here. *Pace*, 415 S.W.3d at 704. In addition,

section 536.070(1) provides that in any contested case, oral evidence shall be taken only on oath or affirmation. Section 536.070(12) allows the introduction of affidavits into evidence, and corresponding objection to their use. "An affidavit is a written declaration on oath sworn to by a person before someone authorized to administer such oath." *Schmidt v. Dir. of Revenue*, 611 S.W.3d 542, 551 n.5 (Mo. App. E.D. 2020). Nowhere does section 536.070 allow the admission of unsworn statements or testimony against a party. The proposition that an employee could lose a constitutionally-protected interest in employment on a record devoid of any verified evidence whatsoever is the antithesis of lawful procedure and the heightened procedural safeguards required in a contested case.

We also observe that the written submission process requires the employee's statement and those of any witnesses to be notarized. Commission Rule XIII, section 5 recognizes procedural safeguards in the course of any hearing, investigation, or fitness test, and gives authority to the director of personnel or the director's representative to administer oaths. Rule XIII, section 6 deals with false statements made under oath, and provides penalties for these statements. Read as a whole and in context, "should" in section III of the written submission process is mandatory as it supplies the agency with competent and substantial evidence upon which to rely.

The City further argues that even if the written submission process requires a notarized statement from the appointing authority, nevertheless there is no reversible error because substantial and competent evidence supported the Commission's decision. The City cites *Null v. New Haven Care Center, Inc.*, 425 S.W.3d 172 (Mo. App. E.D. 2014),[4] and *Lagud v. Kansas*

[4] *Null* is a worker's compensation case, subject to a different standard of review than Smith's case.

City, Mo. Bd. of Police Comm'rs, 272 S.W.3d 285 (Mo. App. W.D. 2008),[5] to support its contention. However, neither *Null* nor *Lagud* stands for the proposition that an agency decision made upon unlawful procedure or without a fair trial should be upheld if supported by sufficient competent and substantial evidence.

The City also argues Smith suffered no prejudice—even if procedural safeguards were not followed—because she had an adequate opportunity to be heard, but she elected the written submission process instead of proceeding with an evidentiary hearing under the MAPA. This argument is merely another iteration of the City's waiver argument that we have already addressed and rejected.

This is a contested case, subject to a measure of procedural formality. *Sapp*, 320 S.W.3d at 163. The MAPA defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Section 536.010(4). "The term 'hearing,' as used in section 536.010(4), means a proceeding at which a 'measure of procedural formality' is followed." *Sapp*, 320 S.W.3d at 163. The written submission process must—and does—contain heightened procedural safeguards that must be followed. Here, however, the Commission failed to adhere to the procedural safeguards contained in its written submission process when it affirmed Smith's suspension. Because the appointing authority's statement setting forth the specific reasons for Smith's suspension was not notarized in accordance with the Commission's written submission process, Smith's due process rights were violated.

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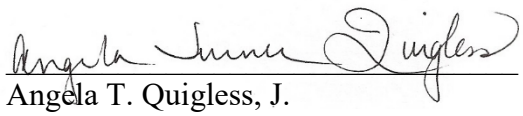
[5] *Lagud* involved an evidentiary hearing, and did not address procedural safeguards. Rather, the issue in *Lagud* was whether there was competent and substantial evidence to support the decision when two versions of events were presented through sworn testimony at the hearing. 272 S.W.3d at 288-89.

Conclusion

We conclude the Commission's decision was made upon unlawful procedure and without a fair hearing in violation of section 536.140.2(5). We reverse the circuit court's judgment, and remand with directions to order the Commission to remove Smith's suspension from her record and determine the amount of back pay Smith lost, together with pre-judgment interest as provided by law.[6]



Angela T. Quigless, J.

Philip M. Hess, P.J. and Colleen Dolan, J., concur.

[6] We need not address whether competent and substantial evidence supports the Commission's decision because the evidence was not notarized or verified. A simple notarization could have led to a different result on appeal.