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In the

Supreme Court of the United States

Robert J. Quinn, Individually And As Commissioner Of The Chicago Fire Department

Petitioner

v.

Francis Muscare

Respondent

No. 75-130

Washington, D. C.
March 30, 1976

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT Petitioner v. FRANCIS MUSCARE Respondent	No. 75-130

Washington, D. C.

Tuesday, March 30, 1976

The above-entitled matter came on for argument at 10:16 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM R. QUINLAN, ESQ., Corporation Counsel of the City of Chicago, 511 City Hall, Chicago, Ill.,60602 for the Petitioner.

LINDA R. HIRSHMAN, ESQ., Jacobs, Gore, Burns and Sugarman, 201 North Wells St., Suite 2122, Chicago, Illinois, 60606, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 75-130, Robert Quinn against Muscare.

Mr. Quinlan, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM R. QUINLAN, ESQ.

ON BEHALF OF THE PETITIONER

MR. QUINLAN: Mr. Chief Justice, and may it please the Court:

The fundamental issues presented for review here are one, whether in suspensions of nonprobationary State and local governmental employees for cause due process requires a hearing before the suspension becomes effective.

Secondly, is due process satisfied by a post-suspension hearing where in the event the charges against the employee are disallowed he is awarded back pay and the suspension is deleted from the employee's service record.

Additionally, because of the context in which this case comes to this Court, there is a collateral issue, that is, whether or not municipal fire departments can constitutionally promulgate rules requiring its fire fighters to limit the amount and location of their facial hair for, among other reasons, to insure the efficient operation of gas masks that fire fighters are required to wear.

The facts are, basically, as follows. The Respondent Francis Muscare, a Lieutenant in the Chicago Fire Department,

has been a fire fighter with the Chicago Fire Department since 1955. The Chicago Fire Department, as I alluded to earlier, has a Rule 51.133 limiting the amount of facial hair that may be worn by fire fighters to at most a small moustache and precisely limited sideburns with no beard. But from October 1973 until the trial of this cause in March of 1974, Lt. Muscare wore a goatee. In fact, some three years before, Muscare had worn the same sort of beard. At that time, he had been ordered to shave it off but refused. In consequence, at a uniform inspection, his superior officers declined to inspect him. He then brought himself into compliance by shaving.

The following year, Muscare again grew a beard. This time, he was summoned before a departmental board consisting of two fire chiefs and an instructor in the fire academy in the use of safety masks. At that hearing he was told to shave off the beard again, and again Lt. Muscare reluctantly complied.

However, in December of 1973, when Lt. Muscare appeared with his squad at the Chicago Fire Department Academy for instruction in a two-day course in the use of self-contained breathing apparatus, which are safety masks, he was again wearing a beard.

The instructor was Fire Fighter Leonard Johnson. Later at the trial, Johnson testified that during the class he informed Muscare on the basis of the instructional material that he had been provided with and his experience that facial hair

should not be worn with safety masks.

Muscare disputed this and contended that New York and Boston permitted fire fighters to wear long hair and beards.

Each member of the class was expected to put the apparatus on, charge it and test it to determine whether or not he was getting a good facial fit.

Johnson stated that by watching a fire fighter try on a mask he could tell whether he succeeded in obtaining a tight facial seal. But Muscare failed to test the apparatus in the class at the Fire Academy.

I might indicate from the record it is not clear whether a lieutenant would be required to do so since he was dealing with a fire fighter as an instructor. However, he did not in fact try on the mask.

On the second day of class, each student was expected to walk up five floors of the Fire Academy building and then back down to the first floor with the gas masks on, sealed and functioning. Muscare did not.

Instructor Johnson stated at the trial that he did not know whether Muscare while wearing his beard could get a good seal on the mask, because Muscare did not put the mask on and a gas mask can be tested only by a man putting it on.

In due course, Instructor Johnson reported Muscare's conduct in the class to the Drill Master. Muscare was soon, in the same month of December 1973, warned that he would not be

permitted to continue working unless he shaved off his beard.

A few days later, Muscare was advised that charges had been filed against him with the administrative authorities of the Fire Department. Because of the fortuitous circumstances the superior with authority to impose the penalty was taken ill with appendicitis, no further action was taken for more than two months. Then a suspension of 29 days was issued in February of 1974 to Muscare and he was notified in person by three superior officers who came to his fire station and informed him that he was suspended, effective immediately. A letter subsequently followed on March 4, 1974, from the Chief of Personnel, Chief Braun, which indicated that he was charged with violation of three rules.

The first rule was the failure to conform to the grooming code; the second rule was his violation of conduct unbecoming a fire fighter; and the third violation was disobedience of a direct and lawful order.

Muscare did not exercise his statutory right provided for under the Illinois Statutes, Chapter 24, Section 18-1, to a hearing before the Civil Service Commission. The Civil Service Commission is empowered in the event that it finds the suspension unwarranted, that the employee would be entitled to back pay for the period of the suspension and erasure of the suspension from his employment.

From an adverse determination of the Commission, the

employee has a statutory right to judicial review with the right of further appeal to the higher court.

Muscare failed to exhaust these remedies. Instead of exhausting these administrative remedies before the Civil Service Commission, Muscare filed the instant lawsuit under 43 USC 1983 on March 11th.

The basic thrust of the complaint dealt with and asked for declaratory injunctive relief on the grounds that the grooming code of the Fire Department infringed upon his constitutional rights, and that the other two violations that he had been charged with were both vague and, therefore, overly broad and unconstitutional. He also indicated that he did not receive due process of law in the imposition of this penalty.

The District Court denied both a temporary and permanent injunction, upheld the validity of the no-beard rule, indicating that Muscare had been afforded due process and entered a judgment in favor of the Department.

Primarily, the court did not look to any of the other two reasons that had been alleged for the basis of this grooming code. One of which was the Fire Department was a paramilitary organization and, as such, required discipline and, two, that the grooming code was appropriate in a uniform force.

QUESTION: Did the District Court focus on the procedural due process question that became the foundation of the Court of Appeals opinion?

MR. QUINLAN: That was primarily not the thrust of the argument before the District Court. It came on in a preliminary injunction and motions were filed in support and opposition to the preliminary injunction.

He determined that the facial -- or the grooming code of the Department was rationally related to safety measures, although other arguments had been made for it. The issue was raised on a motion for reconsideration that due process issues were also raised. He then indicated that his judgment presumed that the due process was satisfactory to comply with the Constitution.

And, accordingly, the judgment, I would say, was based upon both those grounds.

QUESTION: But there wasn't very much discussion of the question of procedural due process --

MR. QUINLAN: No, sir --

QUESTION: -- at the District Court level, was there?

MR. QUINLAN: No, sir, that is quite correct.

On appeal, the attention focused then on the due process issue as opposed to the validity of the grooming code.

The Court of Appeals for the 7th Circuit reversed, finding that no hearing of any kind was afforded the Appellant prior to his suspension, and that full suspension review provided by State statute would not satisfy the requirements of due process.

The Court of Appeals did not deem it necessary to determine whether a trial type proceeding was essential to due process, nor did the Court deem it necessary to pass on the validity of the Fire Department's no-beard rule.

The Court here granted certiorari on March 14, 1975.

As we view the issues, there are several considerations that we believe ought to be taken in resolving this question. Initially, in a governmental type of employment situation, the argument is raised whether it is a property interest or some liberty has been violated before due process applies.

We believe that under the decisions of this Court in dealing with governmental employees that any property or interest in the job is determined by State statute or by contract.

Here we have a State statute which provides for a non-probationary employee to receive certain rights. One of these rights is a hearing if he is suspended for more than five days subsequent to the suspension. For the period from one to five days, no hearing is provided. For any procedure for suspension beyond five days, then there is a full-blown hearing required before the sanction can be imposed. He is entitled to counsel, notice of written charges and subpoena power is available both to the Civil Service Commission and to the individual.

So, in this context, it is our argument that the property right of the individual is determined by the statute.

Once the property right is determined by the statute, the question then becomes what is necessary to accomplish due process of law in that context, as we view the case.

Under our interpretation of the cases of this Court, particularly Arnett v. Kennedy, it is not required that the individual have a pretrial or presuspension hearing. Arnett, as the Court will recall, was a termination case. This is a suspension case. And under these circumstances, we believe, that the right to a hearing subsequent to the imposition of a suspension of more than five days is adequate due process under these circumstances.

On the five day position with one to five days, it would be our contention that the legislature has recognized this as not involving a property right at all, that this would be reviewable only on the basis of an appeal to the Circuit Court by writ of mandamus or, perhaps, by filing a 1983 action in the United States District Court to review whether the action taken was arbitrary or capricious.

QUESTION: Was it ever indicated below what the hearing was supposed to be directed at, or what was the need for the hearing?

QUESTION: The post-trial hearing?

QUESTION: For the presuspension hearing that was claimed. What would be the --

MR. QUINLAN: The contention was that it is a matter

of constitutional due process on the basis of Goss v. Lopez.

QUESTION: I understand that, but what would the hearing direct itself --

MR. QUINLAN: The Court did not answer that question.

QUESTION: I didn't ask about the Court, about the party. The one who is claiming the hearing.

MR. QUINLAN: He indicated that he was entitled to some right to notice and opportunity to be heard.

QUESTION: About what? About what?

MR. QUINLAN: About whether -- one of his contentions was about whether or not the 29-day suspension was a severe suspension under the circumstances, also --

QUESTION: That isn't -- that's just a --

Well, I'll put it another way.

Was there any factual dispute in the case?

MR. QUINLAN: As to his wearing of the goatee? No, there was not.

QUESTION: Or any other factual dispute, for that matter?

MR. QUINLAN: There was a factual dispute in relation to whether or not one could get a close fit, or a tight fit, even if he had facial hair. It was admitted by the expert that testified on behalf of the City of Chicago, as well as by the drill instructor, that it was theoretically possible that such an individual could obtain a good or secure fit. This could not

be determined, however, without the individual trying on the mask.

QUESTION: You won't reach that question, though, unless you say that there are some limits on the right of the Fire Department to prevent beards.

MR. QUINLAN: I think it is a twofold answer to that, Justice White.

First of all, it was upheld at the District Court level as being a general rule of regulation, and as a general rule it could be applied uniformly, even though in specific instances it might not, in fact, cause any danger or safety problem. It was a generic and uniform rule.

So I think that on that ground that that would be the basis of doing it.

Second of all, I think you are absolutely correct, there are a number of cases that now suggest that whether or not the right to wear hair or a hairstyle or facial beards is of constitutional dimension, in dealing with police and fire departments there is obviously a legitimate interest in the State for limiting facial hair.

So in the first point, it was a general rule that the Court found it was based upon a rational related basis, namely, safety. And the expert did testify that in his judgment facial hair would cause difficulties in getting a secure fit on the mask. However, he indicated that because of the structure of

individual faces, because of the difference in the dental structure of chins, etcetera, that in a particular instance it might not, in fact, cause the problem. But as a general rule it was his opinion that facial hair would prevent or could prevent a close or tight fit on the gas mask.

QUESTION: The Respondent contends here, doesn't he, that even though the facts surrounding the gas mask incident may be undisputed, he should at least have had a hearing in order to argue whether a penalty should be imposed to, in effect, argue in mitigation?

MR. QUINLAN: Yes, he does. He argues for a pre-suspension hearing. There is a post-suspension hearing procedure provided for by statute that he did not avail himself of, so that that could have been reviewed at that time. It would have been within the propriety of the Civil Service Commission to either remove it completely or lower it if it did not believe that that was the appropriate suspension.

QUESTION: Is there any opportunity at all before the suspension takes effect for him to write a letter or to say anything at all to anybody?

MR. QUINLAN: There is no formalized procedure, Mr. Justice White. As a matter of fact, he did have these opportunities on other occasions. He once went before a departmental review board to argue the position. It was rejected by the departmental review board. From time to time, these types of

matters have been matters which are discussed within the department, and it is possible to secure a meeting with the member who would be in a position to issue that particular penalty.

There is nothing in the record to support that, but as a practical matter these sources have been available, but it is not a matter of procedure nor a matter of right.

QUESTION: Mr. Quinlan.

MR. QUINLAN: Yes, sir.

QUESTION: Exactly what issue do you consider to be before us on this appeal?

MR. QUINLAN: Well, Your Honor, we consider both issues to be before you.

QUESTION: The due process issue and the substantive validity of the beard regulation?

MR. QUINLAN: Yes, Your Honor, we believe that this Court, of course, has the power to review the facial grooming code of the Fire Department even though the Court of Appeals did not pass on it.

QUESTION: If we agree with the Court of Appeals and the case was remanded for a due process hearing, then that would be the only issue we need address here, I take it? If the Court agreed with the Court of Appeals.

MR. QUINLAN: If the Court agreed with the Court of Appeals that the requirement was correct but that there was a

due process hearing necessary?

QUESTION: If we agreed with the Court of Appeals, do you think we should go ahead and address the substantive due process issue that was not decided by the Court of Appeals?

MR. QUINLAN: Yes, Your Honor, I would submit that I think this Court should because that issue then would remain open. Because even if he were to receive a hearing or this Court were to require a presuspension hearing, the entire issue then comes back to the one that was ruled upon in the District Court as to whether or not this particular rule was constitutional. If it were unconstitutional, of course, then whether or not he had a hearing would be somewhat irrelevant.

QUESTION: The Respondent did not exhaust administrative remedies. Are you making that point?

MR. QUINLAN: We did make that point, Your Honor, yes, that he had the choice to secure administrative remedies under the State procedures and he did not do so.

QUESTION: Do you urge that in this Court?

MR. QUINLAN: Yes, sir, we do.

QUESTION: So you are presenting three issues.

MR. QUINLAN: Yes, sir.

QUESTION: Well, if we were to decide that the grooming code is constitutional, what would be the occasion for a hearing on a remand?

MR. QUINLAN: The occasion for a hearing on remand --

the basis if this Court were to assume that the Court of Appeals appropriately interprets Goss v. Lopez and Arnett v. Kennedy, then, of course, the Court of Appeals was saying that you cannot impose a penalty of even one day or a suspension --

QUESTION: Even if the grooming code were constitutional?

MR. QUINLAN: Even if the grooming code was constitutional.

QUESTION: One question would be whether, even assuming it's a valid regulation -- this hair, moustache and goatee regulation -- whether or not a 29-day suspension was too harsh a penalty. That would be one of the questions to be inquired into at any hearing, wouldn't it?

MR. QUINLAN: Yes, sir.

QUESTION: Can't it involve his good faith belief that it was an invalid regulation. It might involve a good many --

MR. QUINLAN: We suggest that avenue was open to him by seeking review before the Civil Service Commission which he did not avail himself --

QUESTION: That's the separate question suggested by my brother Powell as to exhaustion of administrative remedies.

MR. QUINLAN: Yes, sir. That is correct. That would be an issue, and that would be one of the things, of course, if

he had employed the procedure under the Civil Service Commission. The Civil Service Commission would have to determine whether or not the suspension -- the propriety of the suspension.

QUESTION: Well, do you understand the Respondents to have even made the contention that a 29-day suspension for violation of this regulation, assuming that procedural due process was complied with and assuming that the regulation is valid, is some sort of a cruel and unusual punishment, or so arbitrary that the punishment itself would violate the United States Constitution?

MR. QUINLAN: No, I do not understand them to make that argument. As I understand their argument, Justice Rehnquist, it is that he was entitled to offer evidence in mitigation to determine what might be an appropriate penalty, and that perhaps he might have an argument that in his case he could wear the mask, or that he was advised by counsel that it was unconstitutional, and accordingly these might be grounds upon which the Department would determine that such a suspension was unduly severe.

QUESTION: In addition to having a beard that appeared to violate the regulation, the Respondent declined to obey an express order, didn't he?

MR. QUINLAN: That is correct, to shave off the beard.

QUESTION: Well, I thought the order was to put the

gas mask on and he refused to do that.

MR. QUINLAN: No, there is no evidence that he was ordered to put on the mask. As I indicated earlier to one of the Justices, there would be some question as to whether or not a fire fighter could direct a lieutenant to do so. Normally, --

QUESTION: This was a mask drill, wasn't it?

MR. QUINLAN: A mask drill, yes, sir.

QUESTION: And he did not put the mask on?

MR. QUINLAN: No, sir, he did not at that time. He indicated that he subsequently put it on.

QUESTION: There is no claim that he disobeyed an order to put it on at that time?

MR. QUINLAN: No, sir, that is not --

QUESTION: Because the teacher, the instructor, was a fire fighter, as you said. This Respondent is a lieutenant and there would be some question about any -- the power of a fire fighter to give an order to a lieute even in the environment of a school, correct?

MR. QUINLAN: He probably would have to have the support of the drill master in such circumstances. Normally, if they participate in the drill and it takes place it just goes forward. In this instance the Lieutenant chose not to do so.

QUESTION: He was served with the charges, I take it, before the suspension?

MR. QUINLAN: No, sir. He was notified first by

Chief Morgan that unless he shaved his beard he could not continue to serve in the Fire Service, and a couple of days later he was notified the charges had been tendered to Chief Fire Marshal Foley who was the only one authorized to impose any sanction whatsoever. Chief Morgan could not impose any sanction under the rules of the Fire Department.

QUESTION: What were the charges that were made against him?

MR. QUINLAN: That is not clear. The charges, basically, as I understand them again as it de jures (?) the record was on the basis of failure to shave off the goatee after receiving a direct order to do so.

QUESTION: What did the letter from the Chief of Personnel say?

MR. QUINLAN: The letter from the Chief of Personnel enumerated the three regulations which he was in violation of, one of which was the dress code which specifically provides for a limited wearing of sideburns, a moustache that cannot go beyond the lips and no wearing of face hair on the chin or a beard.

QUESTION: Did it say that he was in violation of those regulations? Did it mention conduct unbecoming an officer and disobedience of orders?

MR. QUINLAN: Yes, sir.

QUESTION: Well, now how about those latter two

matters? Did it indicate -- did the letter indicate what those charges consisted of?

MR. QUINLAN: Well, the direct -- the lawful ones -- no, it did not specifically specify. There were no specifications. There were generic charges. They would evolve, obviously, from the situation where he refused the order of Chief Morgan to shave off the goatee, and this would constitute conduct unbecoming an officer.

Under the State law of Illinois, any of the charges, if sufficient, would be grounds for the suspension.

QUESTION: Do you think the due process question is any different if you are suspended for disobedience to an order than when you are suspended for disobeying the hair code or if you are charged with conduct unbecoming an officer?

MR. QUINLAN: Well, it might be if you are getting into a situation where you are talking about an emergency type of situation, because of the context in which it takes place, that it might be immediately necessary to summarily remove somebody from that position as a fire fighter, such as he refused an order to enter a building or refused --

QUESTION: But if it goes on your record that you are suspended for conduct unbecoming an officer without there being any indication of what the conduct was, that's a little bit different than saying you wore a moustache. It was a little too harsh.

MR. QUINLAN: Yes, it is.

He would have had an opportunity if he chose to seek review of that, to have that set forth, the basis of the various charges.

QUESTION: You are speaking of the Civil Service review?

MR. QUINLAN: Yes.

QUESTION: Suppose he had taken that route, asked for the review and they sustained his position. Would he have received the back pay for whatever period had elapsed?

MR. QUINLAN: Yes, Mr. Chief Justice, he would have and also the disciplinary sanction would have been expunged from his record, so that he would have been right back where he started, as having never been disciplined. The only problem --

QUESTION: There is nothing more that he is asking for that he -- or is there anything that he is asking for that he could not have gotten, conceivably, by the administrative review?

MR. QUINLAN: In my judgment, quite honestly, not. However, he is saying that he has a right before any sanction is imposed to a hearing because of the fact of loss of wages and because of the interference with his alleged property rights.

QUESTION: What about the validity of the grooming code? Could he have had that determined on administrative review?

MR. QUINLAN: He could have raised that issue at that time and the propriety of that would have been reviewed. Probably --

QUESTION: May the Civil Service Commission decide the constitutionality of the question?

MR. QUINLAN: I was just going to say they probably would not have decided on a constitutional basis but they would have reviewed it as to whether or not it was a reasonable regulation of the department.

QUESTION: But that would not answer his constitutional challenge.

MR. QUINLAN: No, but he could raise the constitutional challenge on appeal to the Circuit Court.

QUESTION: I was going to ask: there would have been judicial review of the Civil Service determination?

MR. QUINLAN: Yes, sir, so that after whatever determination the Civil Service Commission made he would be entitled to employ judicial review to the Circuit Court.

QUESTION: Mr. Quinlan, has the regulation since been changed?

MR. QUINLAN: Yes, Your Honor, it has.

QUESTION: And does that affect the posture of this case in any way?

MR. QUINLAN: It is our judgment it does not affect the posture of this case because this was a voluntary change on

the part of the now Personnel Board which has surplanted the Civil Service Commission and the Fire Department. The basis of it was that this case was in conflict with the Kropel case which upheld, basically, the five-day -- the review after more than five-day suspension, plus then we had the case here, Quinn v. Muscare, that held that you had to have a hearing for even one day.

Accordingly, to avoid any problem with issues of back pay or things of that nature, the department personnel chose to adopt the regulation authorizing review for suspensions, even of a day or more. It breaks down into three different categories.

QUESTION: If you prevail here, will you go back to the old regulation?

MR. QUINLAN: I doubt that very much. The procedure has not had a long inventory of experience but this is like any other personnel procedure that is adopted; it seems that once you take a step forward if it seems to work appropriately and is more satisfactory to the personnel, it would continue to persist.

QUESTION: Well, with the change in regulations, I just wonder how important this case has become since it was taken?

MR. QUINLAN: I think it is important on a twofold basis, one of which is the aspect whether or not the burden

would be on the employee to seek review. Under our current rules and regulations, for anything under five days he must file a written notice within 24 hours with the department asking for a hearing. He has a hearing then before a departmental officer and if he concurs in the original judgment that is certified to the Personnel Board that then imposes it. But if he writes the letter the sanction is not imposed for 24 hours. If it is more than five days, he then has 24 hours to ask for a review by the Civil Service Commission. Then it is up to the Civil Service Commission to sustain the finding of the individual department. If it is, obviously, for more than thirty days, between five and thirty, it's the Personnel Board that would determine whether the department's action is appropriate. He has to request it.

On the other hand, if it is more than thirty days, then charges must be brought against him officially with the Personnel Board and that is a full trial-type of proceeding.

QUESTION: Mr. Quinlan, --

MR. QUINLAN: Yes, sir.

QUESTION: -- looking at page 9 of the Appendix, it appears that Respondent did request back pay as a part of his claim for relief in the District Court because he was not given a presuspension hearing. I suppose that element of his claim would survive regardless of the amendment of the regulation.

MR. QUINLAN: I am not sure I understand your question,

Mr. Justice Rehnquist.

QUESTION: Well, presumably, if all he saw was an injunction against the enforcement of these regulations and you change the regulations, the injunctive issue may well be moot. But if he seeks back pay as a result of the application of the injunction, that claim survives, I would think, even though you change the regulations so that injunctive relief would no longer be appropriate.

MR. QUINLAN: If you were to hold that the due process requirements require a pretrial suspension, then I think you are correct. We would then be in a situation where we had suspended him inappropriately and he would be entitled to back pay for that period of time. I think you are correct, sir.

I would like to save what little time I have left for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Quinlan.

ORAL ARGUMENT OF LINDA HIRSHMAN, ESQ.

FOR THE RESPONDENTS

MRS. HIRSHMAN: Mr. Chief Justice, and may it please the Court:

My name is Linda Hirshman and I represent the Respondent Lt. Francis Muscare in this action.

In light of your questions of Mr. Quinlan, I think I would like to begin with the issue of what a hearing might have

consisted of had Respondent been allowed or provided with even the most rudimentary hearing prior to his 29-day suspension.

The record in this case demonstrates that Respondent was suspended from his employment for 29 days, based on three violations -- alleged violations of three Chicago Fire Department rules and regulations, the rule prescribing proper personal appearance, the rule forbidding disobedience of orders and the rule forbidding conduct unbecoming a member or employee of the Chicago Fire Department.

At no time until the hearing in Federal Court on his constitutional claims did Respondent find out from Petitioner what underlying facts were involved in their charges against him.

However, based on these charges alone, obviously, there are several levels at which Respondent could have utilized a prior hearing.

First of all, on the question of proper personal appearance. On the bare facts at issue here, what you have is the administration taking a look at Respondent and making their determination without ever finding out from him, for example, whether his self-contained breathing apparatus fits, which he testified without rebuttal at trial it did, with no problem at drill and fighting fires.

QUESTION: But, Mrs. Hirshman, there is no proviso in the regulation, is there, that you are exempt from it if your

self-contained breathing apparatus fits?

MRS. HIRSHMAN: No, that really speaks to the fact that the Petitioner adhered so tenaciously to the fact that the only justification for the regulation was the safe use of the self-contained breathing apparatus and, indeed, would go to mitigation if not to the substantive violation.

The Fire Commissioner had a range of penalties which he can impose for violations of the range of rules involved in the Fire Department Rules and Regulations, of which Respondent was accused of violating three.

He could have chosen a reprimand. He could have chosen, as Acting Chief Fire Marshal Foley did, initially, in December, to do nothing to Respondent.

Furthermore, Respondent had numerous things to say on the subject of disobedience of orders. Disobedience of orders is a classic factual issue involving questions of the authority to give the order, which we saw discussed here just a moment ago.

QUESTION: Are you speaking of the classroom episode?

MRS. HIRSHMAN: Either the classroom episode or -- we don't know, Mr. Chief Justice, because all we got was a letter that said disobedience of orders. We never found out any factual basis, what orders were disobeyed, who gave them, whether Respondent properly heard them, whether the person was authorized to give Respondent an order, and so forth. All things

of which he should have properly been notified and given an opportunity to respond to before he was suspended for 29 days.

QUESTION: Was he free to ask for what would be the equivalent of a bill of particulars?

MRS. HIRSHMAN: No, Mr. Chief Justice, because essentially what he had was a Chief, in December, said to him -- he did not say to him, "You cannot continue working for the Fire Department if you continue to wear your goatee." That is not what he said.

If you will look at the complaint -- or, I am sorry, Respondent's affidavit which is the only place where there is any evidence about the encounter between Chief Morgan and Respondent. It is there. You will see that that is not what Chief Morgan said. He said something like, "Shave the beard," and "You are working under charges."

QUESTION: Where is the affidavit?

MRS. HIRSHMAN: In the Appendix at pages 18 -- I am sorry, page 19, paragraph, of the affidavit, three.

Petitioner never brought Chief Morgan to testify at the hearing on the preliminary injunction, and so Respondent's affidavit stands unrebutted on the subject of the conversation.

At any rate, working under charges is in a sense part of the sort of on-going employment situation and very different from, "You can't go on working for --

QUESTION: What's your contention as to what kind of

a hearing you had to have before suspension? Forget what kind of a hearing you might be entitled to ultimately. Would it have been enough if they had given you specific notifice of the charges and said if you have anything to say about this write us a letter and you have three days to do it?

MRS. HIRSHMAN: Well, that certainly would have been a great improvement over --

QUESTION: That isn't what I asked you.

MRS. HIRSHMAN: The Court of Appeals for the 7th Circuit said --

QUESTION: Well, what about -- what your contention is -- I want to know what your contention is. What kind of a hearing do you claim you were entitled to?

MRS. HIRSHMAN: We have been living with the changed procedures in the City of Chicago now for eight months. They involve a notice of the charges against you and 24 hours to go to a hearing before -- depending on the length of the suspension -- the internal officer or the Personnel Board. That seems to be working satisfactorily and at least the --

QUESTION: That may be so but what is your contention as to what the Constitution entitles you to with respect to a presuspension hearing?

MRS. HIRSHMAN: This is a presuspension hearing procedure that has been initiated. My position was --

QUESTION: Is this a Goldberg type hearing,

presuspension --

MRS. HIRSHMAN: No, Your Honor, we are not asking for a Goldberg type hearing.

QUESTION: That's what I am trying to find out.

MRS. HIRSHMAN: We are not. We are asking for effective notice. As this Court pointed out in -- particularly in the concurring opinion in Arnett v. Kennedy, procedures involving notice of the charges, notice of the material underlying the charges, the opportunity to respond, orally or in writing, I think depending on the kind of charge that is alleged, and an opportunity for a decision --

QUESTION: By whom?

MRS. HIRSHMAN: Well, the 7th Circuit was not specific and we have graduated procedure, either a hearing officer or the Personnel Board, which is presently excellent. We are not asking for this Court to affirm a neutral hearing examiner. That's not what is at issue here. What we have here is that the City did nothing before they suspended Lt. Quinn, so that --

QUESTION: Why don't you just sum up, one, two, three, what your claim is under the Constitution? What kind of a hearing do you think you are entitled to under the Constitution? One, two, three. Would written notice --

MRS. HIRSHMAN: Written notice, including the underlying facts.

QUESTION: -- and an opportunity to respond in writing is enough?

MRS. HIRSHMAN: I think it depends on what the notice consists of, Mr. Justice White, because some kinds of things are susceptible to written presentations. Other kinds of things, for example, whether or not Lt. Muscare got a good fit --

QUESTION: Why don't we talk about this case?

MRS. HIRSHMAN: All right. I think that this case ought to have involved an ability to appear in person --

QUESTION: So you say the Constitution entitled you to an oral hearing before suspension in this case?

MRS. HIRSHMAN: I am asking you to affirm the Circuit Court opinion that says that this wasn't enough and we'll work out what's enough as we get it on a case by case basis. But I would say that in this case where you have a question, a disputed question of fact, for example, in the mitigation issue in terms of whether or not the man's safety mask fit, he ought to have been given a moment in front of someone with the authority to make a decision about the severity of his suspension to show them -- it's a very simple test -- that he gets a vacuum seal on his face mask.

The question of disobedience of orders is a very large one, and the question of conduct unbecoming a member or employee of the Fire Department is a very large one, and I think depending on what the specifics of the charges were would depend

on how much of a hearing he would be asking for.

QUESTION: You wouldn't say that he was entitled to call any witnesses?

MRS. HIRSHMAN: I think that it varies, as you said, depending on the situation.

QUESTION: Talking about this case, do you think you would have been entitled to call witnesses?

MRS. HIRSHMAN: Before he --

QUESTION: Not general -- not in general, just this case.

MRS. HIRSHMAN: Disobedience of orders might have involved incidents in which calling of witnesses would be very pertinent. I think that what we have here is a situation where the notice was so inadequate that we can't really speak to what the hearing would have to consist of until we had a decent notice of what the charges were.

QUESTION: In the same affidavit that you emphasized to us, paragraph three, that is his affidavit, is it not?

MRS. HIRSHMAN: Yes.

QUESTION: It recites, "that the Chief instructed him to shave his beard off," and that he declined to do so. Now, what could a notice tell you about that that his affidavit doesn't show?

MRS. HIRSHMAN: Well, as it turns out, that what Acting Fire Marshal Foley had in mind when he decided to suspend

Lt. Muscare for 29 days.

Acting Fire Marshal Foley had in mind two earlier incidents that Chief Foley had not been present at, that he had just heard about, when he determined that 29 days was the proper suspension length for Lt. Muscare. So --

QUESTION: Where do we find that out?

MRS. HIRSHMAN: There is testimony to that effect at page 134, "Answer. ...This particular person involved had been involved in this argument about hair and about the beard prior to this affair and had complied by shaving it off. Now it was the second time around."

Now, Lt. Muscare did not have notice that Acting Chief Fire Marshal Foley had in his mind his concept of what had gone before in Lt. Muscare's career, never had a chance to answer him anything about it, when he found three Fire Marshals entering his duty station and telling him to turn in his badge, that he was being suspended for a 29-day period involving a loss of $1400 in pay for him.

Essentially, what we are saying here is that -- and by the way, just as an aside, we have made the contention that due process was violated in the suspension procedures from the very outset of this litigation. It is contained in the complaint and we have consistently litigated the issue and there is substantial testimony --

QUESTION: Is there an administrative hearing still

open to you?

MRS. HIRSHMAN: Yes. There is no time limit on the administrative hearing.

QUESTION: And if you succeeded in whatever it was you wanted to present at that hearing you would get back pay to the initiation of the suspension?

MRS. HIRSHMAN: Yes. The problem with the hearing, in addition to the fact that it is not guaranteed at any time relative to the suspension, that is to say there is no guarantee of promptness in the statute whatsoever -- the statute is silent about the timing of the later hearing. But in addition to that at the later hearing, under the existing law, Lt. Muscare has to bear the burden of proving that the suspension was wrongful, based on a letter which had nothing but three rule numbers on it. And with that kind of notice, and without ever hearing -- as it turned out we found out in the trial in Federal Court -- what Chief Foley, part of what Chief Foley had in his mind. But without ever hearing that, with nothing but that letter under the Illinois law, his later hearing -- he has to go to the later hearing and disprove, for example, conduct unbecoming a member or employee of the Chicago Fire Department without ever knowing what underlay those charges.

And so the later hearing is obviously insufficient under any circumstances, and there is -- it is my understanding that

there is no issue over exhaustion of administrative remedies here, first of all, because we are suing under 1983, and secondly, because as this Court recently handed down in Matthews v. Ellsrich, when you have a claim that your right to a prior hearing has been violated then you don't have to exhaust in order to bring your constitutional claim.

So I think the paucity of, the real lack of value of the later hearing is illustrated by all of these things.

QUESTION: Doesn't the remedies available on the later hearing at least serve to factually distinguish this case from Goss which the 7th Circuit relied on? Here, your man can get back pay and he can get expungement; whereas, I take it, in Goss there was no way that a later hearing could have restored the school children to the days they missed from school.

MRS. HIRSHMAN: Well, the loss of the pay for 30 days for an adult who is working and earning his living and relying on his salary is a serious deprivation, and I don't think that you can so readily distinguish the issue on the grounds that you could always get back pay, because as this Court has noted back pay doesn't necessarily make up for the taking away of the property without prior procedures. In Sniadach the woman might have gotten her wages back and --

QUESTION: Wasn't that true in Arnett v. Kennedy?

MRS. HIRSHMAN: My understanding of Arnett v. Kennedy is that three of the justices who ruled in Arnett v. Kennedy held

that the Federal employee should have been given an evidentiary hearing prior to his discharge, and that two of the justices held that the very protective procedures in Arnett v. Kennedy were sufficient to satisfy, to constitute an accommodation of competing interests, and that three of you directed yourselves to the property issue and --

QUESTION: I am speaking about your argument that has to do with the deprival of pay until after the hearing, and I am asking whether the factual situation in Arnett v. Kennedy wasn't precisely the same in this respect as in this case?

MRS. HIRSHMAN: No, Mr. Justice Blackmun, because in Arnett v. Kennedy the Federal employee had 30 days advance notice of the pending adverse action against him; he had an opportunity to submit affidavits and to appear orally; he had a copy of the charges and the material underlying the charges; he had a really substantially protective procedure before the deprivation was imposed.

My understanding of this Court's recent writing in Bayning -- if that's the proper pronunciation -- v. Indiana State Employees Association is that the question of, is that Arnett did not determine that a public employee could be suspended or discharged without any prior procedures.

Indeed, this case stands in the greatest contrast to Arnett v. Kennedy because for every protective procedure in Arnett there is a complete void of protective procedures here.

In place of 30 days advance notice, fire marshals walked into Lt. Muscare's fire station and told him to turn in his badge. In place of a copy of the material that the discharge was based on, Lt. Muscare didn't find out even what Chief Foley had in his mind until we went to Federal Court on a constitutional challenge to the actions against him.

So that if Arnett represents what is acceptable, it seems to me that what was done in this case represents what is not acceptable. It is so divoid --

QUESTION: If you think there are factual issues and some real substantive content that a hearing might have, why should anyone face up to a constitutional issue until you've gone to, taken advantage of your administrative remedy, and if you succeed you will be reinstated with back pay which is all we could do for your client now.

MRS. HIRSHMAN: Well, Mr. Justice White, when we sued, initially, in District Court, it was only a few days after Lt. Muscare was suspended.

QUESTION: I know, but you could have then gone ahead and taken your --

MRS. HIRSHMAN: Right, but there is -- unlike the preliminary -- we went and asked for temporary restraining order and then for a preliminary injunction, and, unlike that immediate relief, what we were looking for was an injunction against the continued imposition of the suspension against

Lt. Muscare.

QUESTION: But you wanted more than that.

MRS. HIRSHMAN: Well, if they had immediately put him back then the damage issue would be just a week's pay.

QUESTION: That's right, but you weren't immediately put back.

MRS. HIRSHMAN: No.

QUESTION: So, why didn't you pursue your remedies?

MRS. HIRSHMAN: First of all, we did not have adequate notice. All we have --

QUESTION: I know, but you would have gotten adequate notice in the hearing.

MRS. HIRSHMAN: Well, we would have had to go to a hearing at which we bore the burden of proof without ever having had adequate prior notice.

QUESTION: Nevertheless, you might have won.

MRS. HIRSHMAN: I suppose, but we still have that option available --

QUESTION: Why should we decide the constitutionality of that procedure until you've actually been deprived?

MRS. HIRSHMAN: The deprivation has taken place. The deprivation is the deprivation that took place the moment that the suspension was --

QUESTION: There is no way we can -- the only judicial remedy there can be is to reinstate with back pay, I

suppose.

MRS. HIRSHMAN: And to expunge the evidence of the suspension from his file.

QUESTION: That would have happened if you had won in the preliminary hearing.

MRS. HIRSHMAN: But we would have had to go to a hearing and dispute the substance after improper procedures had been used. And the improper procedures are such that they make it impossible for us to, effectively to dispute the substance.

QUESTION: But there is an element of mitigation here, it seems to me, along the line of Justice White's question. Even if you are right about the constitutional requirement of a presuspension hearing, what you are asking for now is, in effect, an award of two years' back pay.

MRS. HIRSHMAN: Oh, no. He was only suspended for 29 days. It is 29 days' back pay.

QUESTION: Well, did he go back to work?

MRS. HIRSHMAN: Yes.

QUESTION: Okay. You are asking for 29 days', $1400 back pay, whereas, for all we know, if you had gone for the post-suspension hearing you might have won and 15 days after the suspension you might have been reinstated.

MRS. HIRSHMAN: No.

QUESTION: How do you know that isn't so?

MRS. HIRSHMAN: There is nothing in the statute to indicate that you could get a hearing, let alone a decision within 15 days.

QUESTION: Okay. So the statute doesn't affirmatively grant you the right, what about the procedures of the Civil Service Commission? Is there anything in the record that would indicate their calendar was such you couldn't have been heard?

MRS. HIRSHMAN: There is nothing in the record at all, Your Honor. We had several valid and serious constitutional claims against the suspension which was being levied against Respondent. We were asking for immediate relief in the form of a temporary restraining order. It was our judgment at that time and it is absolutely de jure (?) of the record, and so I really cannot speak to the tardiness of the Civil Service Commission. You can see in the statute there is no guarantee of immediacy. We went for temporary restraining order which is the fastest kind of relief to get the man reinstated on the grounds that his constitutional right had been violated.

Repeatedly this Court has ruled that 1983 does not require exhaustion of administrative remedies, particularly not where the administrative remedies are so inadequate, as they are here.

QUESTION: Mrs. Hirshman, my brother Rehnquist is trying to say the preliminary, the temporary restraining order, the preliminary injunction, all of those are gone as of right

now, isn't that true?

MRS. HIRSHMAN: Yes, that certainly is true.

QUESTION: So, all you have now is what you could get from the Commission. I think that's his point.

MRS. HIRSHMAN: Well, we are talking about a couple of things. First of all --

QUESTION: What are you asking, other than back pay?

MRS. HIRSHMAN: We are asking for expungement of the man's record, and we are also asking for a declaratory judgment that the procedures which were used to suspend him are unconstitutional, procedures which --

QUESTION: Is that for the future, that he might get in trouble again?

MRS. HIRSHMAN: I would certainly not represent that my client might get in trouble again, but, Your Honor, the continued maintenance of the summary suspension procedures are inherently capable of repetition but evasive of review because they apply only to short suspensions and by the time you get an appeal, particularly to the Supreme Court, the suspension time is over. Any suspension of more than 30 days calls into play the protective procedures of the Illinois statute, so that --

QUESTION: May I interrupt for just a minute, please, Ma'am?

You mentioned the fact that, in effect, the Illinois

statute allows suspension for up to 30 days without a hearing. Let's assume the statute required a hearing if the suspension exceeded five days, would that be valid, in your opinion?

MRS. HIRSHMAN: Well, -- a prior hearing?

QUESTION: Yes. No hearing at all, but if the suspension were only for five days.

MRS. HIRSHMAN: Well, I think that you run into a di-di minimis situation there.

QUESTION: Five days would probably be all right?

MRS. HIRSHMAN: There are suspensions or temporary deprivations so short and so brief in their nature and effect that you might have a de minimis situation in which case the due process protections would not attach. Now, this was a wage earner, earning a fairly decent living, so that you might think that even a week's pay deprivation would be serious enough to call the due process clause into play, but I think that you could argue that five days was de minimis. Although in Goss v. Lopez, this Court held that 10 days was not de minimis.

You would have to draw the line at some very short period, yes. By selecting the 29 days for Lt. Muscare's suspension, the Fire Department suspended him for the longest possible time without affording him the statutory protections available under Illinois law. For suspensions of over 30 days, there are substantially protective prior procedures, but --

QUESTION: Well, there has to be a dividing line

somewhere.

MRS. HIRSHMAN: I don't mean to say that they weren't, under the statute, entitled to do what they did. However, they have contended that their undertaking with regard to Lt. Muscare was somehow done in great good faith and with the greatest of tolerance. And I think that the selection of 29 days which has no calendar or any kind of inherent integrity to suspend him, when any suspension of over 30 days would have called very different procedures into play is an indication of their desire to be as summary as possible with him at that time.

The really peculiar thing about it is that Chief Morgan had, according to the record, told Acting Chief Fire Marshall Foley about Lt. Muscare, something about him, we don't know what, in December, and Chief Foley had determined that he would not suspend Lt. Muscare in December. Lt. Muscare worked at his job fighting fires and wearing his mask, according to his unrebutted testimony, without incident. Two and one-half months later, Acting Chief Fire Marshall Foley changed his mind and said, decided that he would suspend Lt. Muscare.

QUESTION: Is there a remote possibility that the administration of the Fire Department is concerned that if they let Muscare have a small moustache the next thing they will have is a man who wants a little bit longer one and somebody else a little bit longer? Isn't this a matter on which the

administration of an organization like this has to have some regulations?

MRS. HIRSHMAN: Well, Your Honor, it is our position that this Court is not confronted with a Court of Appeals ruling on the issue of the personal appearance rule. The --

QUESTION: Well, it has a good deal to do with the matter of obeying orders, when he was ordered to dispense with the beard, doesn't it?

MRS. HIRSHMAN: Yes. The Petitioner has argued that the personal appearance rule is constitutional. Throughout these proceedings, they have contended that it is justified by safety.

The amicus curiae have pointed out in their brief that the safety justification simply is not supported by the facts in the record, but in any case that the procedures used in this case for this permanent public employee are so arbitrary that they represent a level that is below even the most rudimentary requirements of the due process clause, and that they cannot be sustained. Accordingly, we would ask that this Court affirm the judgment of the Court of Appeals of the 7th Circuit.

QUESTION: Mrs. Hirshman, just before you sit down, I hesitate to add to your problems, but I am having a problem.

In colloquy with my Brother Marshall, you explained that the reason that you are here and the reason that you could

get more relief here than you could have in the administrative proceedings was that this is a situation that is capable of repetition and yet evading review. Yet, as I understand it, and, I think, as you told Mr. Justice Blackmun earlier, the rules have now been changed and they have been changed in a way that would, fully, as I understand it, fully satisfy your constitutional claim, and there is no indication that they are going to be changed back.

MRS. HIRSHMAN: Well, there is. In Petitioner's reply brief, they specifically represent that the rules were changed only for purposes of complying with the 7th Circuit's decision in this case last May, and that they couldn't say whether -- that they had done it specifically for that purpose, that they were waiting for this Court to make a determination and that they couldn't say whether or not they were going to change them back. So we have an indication from the very people that were responsible for the change that they are seriously considering changing them back.

They specifically say in their brief on page 12, reply brief on page 12, "At least until the issues raised had been settled by this Court, this procedural change was adopted as an interim measure."

So we have that and, of course, we are making a constitutional claim and we are asking for back pay and for expungment of his file, and, you know, 42 USC 1983 does provide

that we are properly in the Federal court.

QUESTION: Yes, I understand, but it is not every case in which you have a change in the rules of the game that fully satisfies your constitutional claim, as I understand it. Am I correct about that?

MRS. HIRSHMAN: We've only starting living with the new rules --

QUESTION: Had these rules been applied to your client's case you would be fully satisfied constitutionally, would you not?

MRS. HIRSHMAN: On the whole, although we never -- again, you know, since we don't know what was involved, since we got such an inadequate notice, we don't know what we would have needed, because we never found out exactly what it was that the Fire Department had in mind. But in any case --

QUESTION: Just what in addition to these rules do you claim the Constitution requires, the new rules?

MRS. HIRSHMAN: I think it varies from one fact situation to another. As I pointed out, there might be a situation in which, for example, criminal conduct was alleged in which the person might want to bring an alibi witness, or something like that. So I think that it really -- as this Court has so many times ruled, it should be flexible. I think --

QUESTION: That's not your case. There wasn't any criminal conduct alleged and you didn't have any alibi --

MRS. HIRSHMAN: I think that Lt. Muscare would have faired just fine under these regulations.

QUESTION: Your client. He would have faired -- he would have had everything that you are saying the Constitution requires, would he not?

MRS. HIRSHMAN: Insofar as I can judge from the notice that I got.

QUESTION: You are a careful lawyer. You hedge every answer, I'll say that.

QUESTION: You still want some back pay, though?

MRS. HIRSHMAN: Yes, I am asking for 29 days back pay and for expungment of his record as this kind of thing, his permanent Civil Service record, is very significant to him.

QUESTION: You can get that from the Commission.

MRS. HIRSHMAN: Not necessarily.

QUESTION: I said you can.

MRS. HIRSHMAN: They have the power to issue those remedies but we would be going on a substantive issue with inadequate notice and bearing the burden of proof.

QUESTION: Despite what my Brother Stewart said, we agree that it is possible that they might, perhaps under some circumstances unknown to you get relief?

MRS. HIRSHMAN: Yes, Your Honor.

QUESTION: Thank you.

MRS. HIRSHMAN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Quinlan?

REBUTTAL ORAL ARGUMENT OF ROBERT J. QUINN, ESQ.

ON BEHALF OF THE PETITIONER

MR. QUINLAN: Just quickly, Your Honor, I would just like to note two things: one, the reason for the 29 days is observed on page 134 of the Abstract where the severity of the sanction was given because of the fact this had occurred before and he did not shave the beard off in the interim.

Page 105 of the Abstract indicates that Chief Fire Marshall never indicated that he would not take sanctions.

One other observation I would like to make is that I think we do have to have some minimal guides in terms of standards of what due process requires when we are talking about applying sanctions to some 40,000 employees in a city the size of the City of Chicago.

Finally, for whatever it is worth, on page 161 of the Abstract, the Court of Appeals indicates that he was warned that he could not continue as a fire fighter. I don't think that whether he was actually warned he couldn't continue as a fire fighter or not is of any real substantial dimension. He was told he was to shave off his beard and the charges had been filed.

Thank you, Your Honor.

QUESTION: The second point, I gather, is that you

agree with your adversary counsel that this case is here for decision and should be decided.

MR. QUINLAN: Yes, Your Honor. What we are saying is --

QUESTION: There is nothing moot about it.

MR. QUINLAN: -- if we continue the rules it would be a matter of employer-employee relations. We are not saying they are of constitutional dimension. We did have those two court decisions which required us to do something in the interim.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:16 o'clock, a.m., the case in the above-entitled matter was submitted.)