

Opinion No. 56-6424

April 20, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Homer C. Pickens, Director, Department of Game and Fish, Santa Fe, New Mexico

On April 5, you addressed an inquiry to this office in which four questions were asked. The questions are directed to the type of hearing which is required in § 1 of Chapter 59, 1955 New Mexico Session Laws, (§ 53-1-5, N.M.S.A., 1953 Comp., p.s.). That section reads as follows:

"The state game commission shall employ a director who shall, under such authorization that the game commission shall approve, employ such conservation officers, clerks and other employees as he shall deem proper and necessary to enforce and administer the laws and regulations relating to game and fish, and who shall prescribe their duties respectively, and who with the advice and consent of the state game commission and the approval of the state board of finance, shall fix the compensation of all the employees of the department of game and fish, which is hereby created.

The state game commission may at any time discharge said director for reasons that the state game commission shall deem sufficient. The director may at any time discharge any employee for good cause.

Provided that the employee may request and receive a hearing before the state game commission, such request to be made within fifteen (15) days after he receives the notice of discharge."

A diligent search was made by the writer to determine the effect of the proviso in the last paragraph where nothing further is stated. This was to no avail, as each statute encountered by your writer provided a further explanation of the effect of such proviso. This then becomes strictly a question of statutory construction based upon the rules of statutory construction which have heretofore been adopted for general application.

The questions asked will be answered in the order in which they are asked.

Question 1. There has been a request by Mr. Thompson for a Bill of Particulars. Please advise what is contemplated by the law with respect to this request.

Answer: The Bill of Particulars required by the Commission, while it is not mentioned in the statute, we believe is perfectly within the power of that hearing body to require or not require, as they see fit. A Bill of Particulars is defined by Black's Law Dictionary as a "written statement or specification of the particulars of the demand for which an action at law is brought . . . furnished by one of the parties to the other . . . (citing cases). It is

designed to aid the defendant in interposing proper answer and in preparing for trial by giving him detailed information regarding the cause of action stated in the complaint. (citing cases)." Thus, when a Bill of Particulars is ordered the other party must in that Bill of Particulars be apprised of the specific reasons for the charge.

Question 2. Should witnesses be sworn?

Answer: There is no provision in this law for the swearing of witnesses or the taking of sworn testimony. In the field of administrative law informal hearings are approved of and are the rule more often than formal hearings with sworn testimony. 42 Am. Jur. 488. We believe, however, that sworn testimony could be introduced if the Commission so desires by having a notary public present and swearing the witnesses. We believe that this is entirely in the discretion of the hearing body, that is to say, the Game Commission.

Question 3. What order of presentation of proof should be followed?

Answer: This is also a matter strictly in the discretion of the Game Commission, and any rules that they set down so long as a hearing is given and all of the competent evidence is permitted to be introduced, will suffice. We believe that the method of proceeding is not particularly important nor is it restricted or specified in this statute. The Commission may, if it sees fit, determine that the Director must put on his case first and show the reasons for the discharge, or it may treat the matter as "an order to show cause" why the discharge should not be affirmed, thus, placing the burden upon the petitioner. We believe that that is entirely in the discretion of the hearing body.

Question 4. What action may the Game Commission take after hearing the matter?

Answer: This statute states that the Director shall be the employing officer, and that he may discharge an employee "for good cause". The very next paragraph provides that a hearing should be given. The only thing a hearing could possibly determine would be whether or not "good cause" exists. There is no definition in the statute as to what would constitute "good cause", and the cases found by your writer are multitudinous and varied. The only case in New Mexico on the subject is the case of State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077, wherein the Supreme Court held that the Governor when required to give cause for the discharge of an employee must state what that cause is. However, they held that there was no provision for review of the Governor's determination and that merely stating what the cause of the discharge was is sufficient. This statute provides for a hearing after the "good cause" action is taken. It is my belief that the Commission, while it cannot substitute its judgment of what constitutes "good cause" for that of the Director, may determine the legality of the Director's actions so far as whether or not the discharge was arbitrary and capricious. In the event they determine such to be the case, we believe they can order the reinstatement of such an officer. On the other hand, if the action of the Director was not arbitrary and unfounded, the Commission may take no action.

By Fred M. Standley

Assistant Attorney General