IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PAUL HOFFMAN,

OPINION and ORDER

Plaintiff,

06-C-153-C

v.

KARL KELZ, in his individual capacity, THE VILLAGE OF RIB LAKE and ARCH EXCESS AND SURPLUS INSURANCE COMPANY,

Defendants.

- -

In this civil action, plaintiff Paul Hoffman contends that defendants Karl Kelz and Village of Rib Lake violated his Fourteenth Amendment right to due process. Specifically, plaintiff contends that defendant Kelz interfered with plaintiff's liberty interest in pursuing his chosen vocation by making negative remarks about him to defendant Village of Rib Lake, resulting in the village's decision not to renew his employment contract. Plaintiff contends that defendant Village of Rib Lake violated his right to due process by failing to provide him with a name-clearing hearing to address the charges made against him by defendant Kelz. Jurisdiction is present. 28 U.S.C. § 1331; 42 U.S.C. § 1983.

Now before the court are (1) a motion for summary judgment filed by defendants Village of Rib Lake and Arch Excess and Surplus Insurance Company and (2) a motion for summary judgment filed by defendant Kelz. In opposing a motion for summary judgment, a nonmoving party must come forward with evidence to support each element of his claim on which he will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In this case, plaintiff has failed to adduce any evidence that defendants' conduct implicated his liberty interest in his reputation. That alone is ground for granting defendants' motions. However, even if plaintiff had shown that he was entitled to process in connection with the statements made about him by defendants, the undisputed facts reveal that he was given all the process he was due. No further relief is available to him; consequently, defendants' motions for summary judgment will be granted.

Before turning to the undisputed facts, I note that both parties had mentioned facts in their briefs that were not proposed as facts as required under this court's summary judgment procedures. Facts that were included in the briefs but not in the parties' proposed findings of fact have been disregarded. From the parties' proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Paul Hoffman is an adult resident of Wisconsin. From 1999 until the expiration of his employment agreement on December 31, 2003, he was employed as the Village of Rib Lake police chief.

Defendant Karl Kelz has been the district attorney for Taylor County, Wisconsin since 2002.

Defendant Village of Rib Lake is a municipal corporation organized under the laws of Wisconsin. The village is insured by defendant Arch Excess and Surplus Insurance Company.

B. Plaintiff's Employment with Defendant Village of Rib Lake

As police chief for the Village of Rib Lake, plaintiff was responsible for providing police protection to the village and for testifying in court during criminal prosecutions. On September 10, 2003, defendant Kelz appeared in court for a hearing in a case captioned State v. Seebeck. Plaintiff did not attend the hearing.

On September 10, 2003, defendant Kelz sent plaintiff the following letter:

> I am writing this letter to express my displeasure with your failure to appear for court hearings concerning cases you have initiated from Rib Lake. On September 8, 2003, a motion hearing was set for the defendant B[.] S[.] . . . As I review the file, I note that you were notified of this hearing on July 2, 2003. My office sent you a notice of the court hearing which was to be held on September 8, 2003 at 2:45 p.m.

Due to your failure to appear, the Court granted the defense motions: 1) to suppress any and all statements the defendant gave to you that night, and 2) to suppress the physical evidence in this case . . . .

Further, I am sending you this letter to express my great displeasure as this is the third time my office has sent you notice for court hearings and you have failed to appear and/or phone to state why you did not appear. This is the third time I have had the court rule in favor of defense motions to either suppress statements, suppress evidence, or find lack of probable cause because I did not have the arresting officer present for the hearing. You must understand that when the defense attorney files these types of motions, it is the burden of the State to prove these issues. If the State cannot produce the necessary evidence, the Court, by law, is required to rule in the defendant's favor.

This is the third criminal case that you have not appeared on and this is the third criminal case I have had to dismiss solely because of your failure to appear to court when notified by my office. I, as most other District Attorneys, customarily notify the local officers with a written notice as opposed to a subpoena. We do this as a courtesy because most law enforcement agencies accept their responsibility to show up and appear for court and give testimony, therefore not necessitating the need for a subpoena.

However, this is the third time you have failed to appear after receiving written notice for court testimony concerning Rib Lake cases. Due to this fact, from this point on I shall be issuing a subpoena to require your appearance in court for all cases concerning my office. It is apparent to me that I cannot rely on a simple written notice to remind you to come to court. Therefore, you will be served with a subpoena for every court appearance I will need you for in the future. I am greatly concerned that a Chief of Police would fail to show for court so many times requiring me to dismiss criminal cases because of your actions.

. . . Please also be advised I am forwarding a copy of this letter to the Rib Lake Police Committee concerning this action. Normally, an incident like this I would send to the Chief or the Sheriff concerning one of their officers, however, because you are the Chief of Police I believe it is appropriate to send

it your superiors. . . .

Shortly after plaintiff received the letter, he met with Kelz to discuss the allegations contained in it. In addition, plaintiff wrote the following letter to the village board on September 11, 2003:

> Concerning the letter from Karl Kelz:
>
> The B[.] S[.] case letter was never received by my department on July 2, 2003 (while I was in the hospital). Kelz relies on a letter he says he sent July 2, he never called to Follow up and I NEVER GOT THE LETTER otherwise I would have been in court. The S[.] case has never came [sic] up when I talked to them. I was working on the September 8th court date but if I don't know about a case I can't get down to the DA's office everyday to make sure they don't need me. They can't rely on a letter in the mail (two months before and a letter I never received) you would think they would follow up with a simple phone call before the court date and communicate with us. I have gone down to the court house on numerous occasions because of a letter in the mail about a court date and have [sic] to turn around and come back because it was cancelled. The Chief from Gilman has the same PROBLEM AND CONCERNS ABOUT THEIR PROCEDURE FOR THESE COURT DATES. Mr. S[.] did't [sic] get a free pass. He was placed on a chapter 51 and received the help he needed. I have also been following up with people in the community to see how he is doing and the witnesses haven't had any concerns with him. He also has guardians to watch over him.
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> The second case Kelz called me and said if he needed me he would call and HE NEVER CALLED. I never had anything to due [sic] with that case I took no statements.
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> The third case is still[] going on.
>
> I talked with Karl Kelz on September 11, 2003 and these were discussed and I told him I was never notified and was working September 8th. The other cases were discussed also. We discussed of [sic] putting his notices in my box

> at the sheriff's dept where I would have a[n] envelope and sign off acknowledging that I received it so he know [sic] I received a notice if any. If the DA's office wants to continue to send them by mail they need to send or have it certified so I receive the letter or have some type of follow up.

After defendant Kelz received a copy of plaintiff's letter, the tension between him and plaintiff escalated. In a letter dated September 15, 2007, defendant Kelz accused plaintiff of lying, blaming others for his own incompetence and violating the law by revealing confidential information about B. S.'s protective placement status to the board. In addition, defendant Kelz informed the village board that he would no longer prosecute any cases brought to him by plaintiff because he "would feel very uncomfortable placing [plaintiff] on the stand under oath for any type of hearing." Defendant Kelz wrote a letter to Taylor County Sheriff Jack Kay, stating that he would not accept any future reports or investigations from plaintiff, and therefore that the sheriff's department would need to respond to any reports of crime in the Village of Rib Lake

Upon receiving defendant Kelz's letter, Kay wrote to plaintiff, suspending him immediately from his position as deputy for the Taylor County sheriff's department. On September 16, 2003, defendant Village of Rib Lake's board met in closed session and decided to place plaintiff on administrative leave pending a hearing to investigate the tensions between him and defendant Kelz.

Following plaintiff's suspension, Village Board President Dennis Nawracaj invited

plaintiff to appear before the board at a September 24, 2003 hearing. Nawracaj told plaintiff the meeting would be "a fact-finding or informational hearing, or something of that nature." Upon learning of the meeting, defendant Kelz wrote to the board and asked to appear at the September 24 meeting, too.

On September 24, 2003, plaintiff and Kelz appeared separately before the village board to address the matters raised by defendant Kelz. Plaintiff was not present during the portion of the meeting when Kelz addressed the board. When it was plaintiff's turn to appear, the village board's lawyer, Jeff Jones, asked questions that plaintiff's lawyer, Gordon McQuillen, answered. When Jones asked McQuillen whether he wanted to address the board further regarding defendant Kelz's accusations, McQuillen replied that plaintiff could not respond without seeing certain telephone records. (Although the village made copies of these records for plaintiff after the hearing, neither he nor McQuillen picked them up from the village office.)

After the September 24 hearing, the village released the following public statement:

> The Village Trustees have received many questions about Police Chief Paul Hoffman's current employment status. The Board issues the following media release regarding Chief Hoffman.
>
> Mr. Karl Kelz, Taylor County District Attorney, has advised the Board that Chief Hoffman has not attended a number of scheduled court hearings for which he received proper notification. The District Attorney has also advised the Board that Chief Hoffman's failure to appear for the hearings has resulted in dismissal of criminal cases. Chief Hoffman has provided justification to the

Board for the hearings that he has missed.

> Mr. Kelz advised the Board that Chief Hoffman's justifications are inaccurate. Mr. Kelz has also advised the Village Board that he will not prosecute past or future cases involving Chief Hoffman. Taylor County Sheriff Jack Kay has de-deputized Chief Hoffman.
>
> The Village Board has concluded that these actions have severely impacted Chief Hoffman's effectiveness as the Police Chief for the Village of Rib Lake. The Village Board has placed Chief Hoffman on administrative leave pending further review of this matter. The Board is attempting to arrange for part-time police officers to provide law enforcement protection for the Village at this time. In the meantime, the Taylor County Sheriff's Department is providing law enforcement coverage for the Village and its residents.

On September 29, 2003, McQuillen wrote to the board, challenging the accuracy of defendant Kelz's version of events and providing additional information about the three cases in which plaintiff had failed to attend hearings. Although McQuillen offered to appear before the board again, Jones informed him that the board did not need further information.

On October 6, 2003, defendant Kelz wrote again to the board, refuting facts alleged in McQuillen's September 29 letter. Defendant Kelz referred to plaintiff's conduct as "reprehensible" and accused plaintiff and McQuillen of presenting a distorted version of the facts. The letter was never disclosed publicly.

On October 15, 2003, the village board met in closed session and decided to keep plaintiff on administrative leave until his contract expired in December 2003. After concluding its deliberations, the village board made the following statement in open session:

> Chief Paul T. Hoffman is unable to fully perform his duties as Rib Lake's Chief of Police. The Taylor County District Attorney questioned Hoffman's failure to appear at court hearings. The DA will no longer accept Hoffman's reports and/or prosecute his cases. He also questioned his veracity and honesty [sic]. The Taylor County Sheriff's Department has suspended Hoffman's status as deputy sheriff and has taken responsibility of law enforcement in investigating criminal cases for the Village. Therefore, it was moved by Tlusty, seconded by Eckman, that the Board extend Paul T. Hoffman's administrative leave status until his contract expires on December 31, 2003.

Plaintiff did not receive any further opportunity to refute the allegations Kelz had made against him. However, plaintiff has no additional evidence to present to the village board regarding his failure to appear at the three criminal hearings that formed the basis of defendant Kelz's complaints against him.

OPINION

When plaintiff filed his amended complaint in this case, he alleged that defendants Kelz and Village of Rib Lake had violated his right to due process by making public statements about him that were false and prevented him from obtaining employment as a law enforcement officer. Plaintiff requested relief in the form of a name-clearing hearing and monetary damages. Now, defendants have moved for summary judgment. The standard to be applied is well known. Summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.

R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). If the non-moving party fails to adduce evidence on any essential element on which he would bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court examines the facts in the light most favorable to the non-moving party. Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

The law governing plaintiff's claim is well-established. The Fourteenth Amendment prohibits states from depriving citizens of life, liberty or property without due process of law. Defamation by itself does not implicate an interest protected by the due process clause. Siegert v. Gilley, 500 U.S. 226, 233 (1991) (citing Paul v. Davis, 424 U.S. 693, 708-09 (1976)); Atwell v. Lisle Park Dist., 286 F.3d 987, 992-93 (7th Cir. 2002). However, "defamation together with other action . . . may work to deprive a plaintiff of a liberty or property interest, so that the two things together state a § 1983 claim." Bone v. City of Lafayette, Indiana, 763 F.2d 295, 297-98 (7th Cir. 1985).

When an employee contends that a government employer has infringed his liberty to pursue the occupation of his choice, "the employee must show that (1) he was stigmatized by the defendant's conduct, (2) the stigmatizing information was publicly disclosed and (3) he suffered a tangible loss of other employment opportunities as a result of public disclosure." Townsend v. Vallas, 256 F.3d 661, 669-670 (7th Cir. 2001). "[A]t the heart

of every claim that an employer has infringed an employee's liberty of occupation, is a charge that the 'circumstances of the discharge, at least if they were publically stated, had the effect of blacklisting the employee from employment in comparable jobs.'" Id. at 670 (quoting Colaizzi v. Walker, 812 F.2d 304, 307 (7th Cir. 1987)). In such cases, it must be clear that the employee's good name, reputation, honor or integrity were called into question in a manner that makes it virtually impossible for the employee to find new employment in his chosen field. Id. If, and only if, a government defendant has maligned the plaintiff in this way, the employee is entitled to have "an opportunity to refute the charge[s]" made against him. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972).

A. Liberty Interest

For reasons that are not entirely clear, the parties have focused almost exclusively on the question whether plaintiff was given adequate opportunity to "clear his name" at his September 24, 2003 meeting with the Rib Lake Village Council. However, before the court can address the adequacy of the hearing afforded plaintiff, it should be clear that he was entitled to a hearing in the first place. It is not obvious that he was.

To the extent that defendant Kelz's allegations against plaintiff led to the nonrenewal of his employment contract, plaintiff has shown that he was stigmatized by defendant Kelz's statements. However, plaintiff has conceded that the statements made by defendant Village

of Rib Lake were not similarly stigmatizing, see, e.g., Dfts.' undisputed PFOF #40, dkt. #28, at 7, and because he has his claim against the village fails from the start. Nevertheless, plaintiff asserts that defendant Village of Rib Lake should remain a defendant in this case because it is the only party situated to provide him a name-clearing hearing, the equitable relief he seeks for the alleged wrong defendant Kelz committed.

Setting aside the question whether it would be proper to order a defendant to provide relief to a plaintiff when the defendant has done no wrong, it is not clear from the evidence plaintiff has adduced that he "suffered a tangible loss of other employment opportunities as a result of public disclosure." Such proof goes to the very heart of plaintiff's due process claim.

> The public employee's constitutional right not to be fired on "stigmatizing" grounds is one of the more mysterious innovations in modern constitutional law. Reputation is not "property" or "liberty" within the meaning of the due process clauses of the Fifth and Fourteenth Amendments. . . . To understand the tort you must go back to its origins in cases where public employees were fired for suspected Communist sympathies. In the atmosphere of those times, employees fired on such grounds found it difficult to land equally responsible jobs, public or private. The circumstances of discharge, at least if they were publicly stated, had the effect of blacklisting the employee from employment in comparable jobs . . . By firing a worker on publicly stated grounds that kill his chances for further employment in his chosen occupation, the government in effect excludes him from that occupation, and thus deprives him of liberty in a Fourteenth Amendment sense, and thus must give him due process of law.

Colaizzi, 812 F.2d at 307 (internal citations omitted). The employee's protected interest lies in his occupational liberty, not his reputation. Id. "[W]hether an employee charges

that, in the course of firing him, an employer defamed him by either (1) damaging his good name, reputation, honor or integrity or (2) by imposing a stigma or other disability upon him that foreclosed other employment opportunities, the employee must show that, because the charges have been made, it is unlikely that anyone will hire him for a comparable job in the future." Townsend, 256 F.3d at 670 n. 9.

Although defendant Kelz made statements about plaintiff that impugned his competence and his honesty, plaintiff has adduced no evidence that Kelz's statements harmed his occupational liberty. Plaintiff has not proposed as fact that he even sought employment as a police officer following his employment with defendant Rib Lake or that he was denied employment on the basis of the statements made by defendant Kelz. Although it may be true that defendant Kelz would have trouble obtaining employment as a law enforcement officer as a result of defendant Kelz's accusations, it is not self-evident that the statements would exclude plaintiff automatically from consideration for all future law enforcement jobs. Without some evidence that defendant Kelz's statements were more than defamatory, it is difficult to see how plaintiff can show that defendants interfered with any liberty interest for which process would have been due.

B. Name-Clearing Hearing

Although defendants may be entitled to summary judgment on the ground that

plaintiff has not shown defendants that interfered with a protected liberty interest, the parties have focused on the question whether the name-clearing hearing that plaintiff seeks as relief has been provided already. Because the September 24, 2003 hearing provided plaintiff with ample opportunity to address the charges defendant Kelz made against him that led to the nonrenewal of his employment contract, defendants are entitled to summary judgment on that ground.

Assuming a plaintiff has proven "all of the other elements necessary to make out a claim of stigmatization . . ., the remedy mandated by the Due Process Clause of the Fourteenth Amendment is "an opportunity to refute the charge" against him. Codd v. Velger, 429 U.S. 624, 627 (1977) (citing Roth, 408 U.S. at 573)); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1972) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."). The sole purpose of such notice and hearing is to provide the person an opportunity to clear his name. Id.

The due process clause requires that an individual be given the opportunity to be heard at a meaningful time and in a meaningful manner. Goldberg v. Kelly, 397 U.S. 254, 267 (1970). In determining whether a given procedure serves that purpose, courts examine (1) the nature of the interest affected by the official action; (2) the government's interest; and (3) the risk of error and the effect, if any, of additional safeguards. Mathews v. Eldridge,

424 U.S. 319, 335 (1976). As discussed above, the nature of plaintiff's interest is his freedom to pursue his chosen field of employment. The government interest at stake is its ability to execute and explain its personnel decisions quickly. Segal v. City of New York, 459 F.3d 207, 215 (2d Cir. 2006). Finally, the risk posed by the government's action is "the risk that the false charges against the plaintiff will go unrefuted and that his name will remain stigmatized." Patterson v. City of Utica, 370 F.3d 322, 336 (2d Cir. 2004).

"[I]n its essence, a hearing demands that [a] person have the right to support his allegations by argument, however brief, and if necessary, by proof, however informal. Endicott v. Huddleston, 644 F.2d 1208, 1216 (7th Cir. 1980). However, there are no set procedures that must be followed at a name-clearing hearing. The only real requirement is that the maligned employee be given a chance to refute the charges made against him. Wojcik v. Massachusetts State Lottery Commission, 300 F.3d 92, 103 (1st Cir. 2002) ("The purpose of the hearing is only to allow the employee to clear his name of the false charges; compliance with formal procedures is not necessarily required."); Chilingirian v. Boris, 882 F.2d 200, 206 (6th Cir. 1989) (name-clearing hearing need only provide opportunity to clear one's name and need not comply with formal procedures to be valid); Gregory v. Hunt, 24 F.3d 781, 788-89 (6th Cir.1994) (name-clearing hearing adequate where employee was allowed to speak at an informal hearing and later to submit a written response to the allegations against him); Baden v. Koch, 799 F.2d 825, 830-833 (2d Cir. 1986).

Furthermore, it must be evident that a hearing would give the employee an opportunity to present evidence he has not disclosed publicly already. For that reason, courts have held that post-termination name-clearing hearings need not be held for employees who have been acquitted of alleged criminal conduct following jury trials, Graham v. City of Philadelphia, 402 F.3d 139, 144 (3d Cir. 2005), Seeley v. Board of County Commissioners for La Plata County, Colorado, 654 F. Supp. 1309 (D. Colo. 1987), employees who do not dispute the substantial truth of the allegations made against them, Codd, 429 U.S. at 627-28, and employees who have been given pre-termination hearings to address the allegedly false allegations against them, Liotta v. Borough of Springdale, 985 F.2d 119 (3d Cir. 1993).

In this case, defendant Village of Rib Lake notified plaintiff that it would hold a "fact-finding" or "investigative" hearing on September 24, 2003. Before attending the meeting, plaintiff was aware of all letters defendant Kelz had submitted to the board, and submitted letters of his own, admitting some of Kelz's allegations (missing the hearings, for example) and denying others (such as the allegation that he had received notice of the B. S. hearing). Plaintiff attended the September 24 hearing, along with his lawyer. Although plaintiff was not present when defendant Kelz spoke to the board, it is undisputed that the substance of Kelz's comments was materially identical to the allegations Kelz had made in his letters to the board.

At the hearing, plaintiff's lawyer answered questions posed to him by the village

board's lawyer. Although given the opportunity to provide additional information, plaintiff's lawyer told the board he was not in a position to do so. Following the hearing, plaintiff's lawyer submitted a letter to the board, reiterating more forcefully plaintiff's position with respect to each of defendant Kelz's allegations. Plaintiff concedes that he has presented to the board all the information he has regarding his missed court dates.

"[I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation." Codd, 429 U.S. at 627. Although plaintiff disputed some of the allegations made against him by defendant Kelz, he had ample opportunity to present his side of the story to the village board. He has not suggested any additional information he might provide to the board that would have refuted defendant Kelz's allegations and he has not shown any way in which the process he was afforded was insufficient to provide him with an opportunity to clear his name.

To say that defendants did not violate plaintiff's due process rights is not to say that the manner in which defendant Kelz approached plaintiff and the village board was courteous or that his allegations were true. Such considerations lie outside the scope of this court's review. Plaintiff's sole claim in this lawsuit is that defendants violated his right to due process. Because plaintiff was afforded at least as much process as he was due under the Fourteenth Amendment, defendants' motions for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants Village of Rib Lake and Arch Excess and Surplus Insurance Company is GRANTED.

2. The motion for summary judgment of defendant Karl Kelz is GRANTED.

3. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 20th day of February, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge