STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

June 19, 1975

Opinion No. 75- 245

Mr. Max Bickford
Executive Officer
Kansas Board of Regents
Suite 1416 - Merchants National
Bank Tower
Topeka, Kansas 66612

Dear Mr. Bickford:

You advise that at Emporia State College, an employee has filed a timely appeal from a performance rating of "fair," pursuant to K.A.R. 1-9-3. An appeal committee has been designated by the appointing authority, which has begun to function, and has talked to the rating officer and the employee's immediate supervisor. The employee has declined to talk to the committee without benefit of counsel.

Two questions are raised initially, whether the appeal process is an adversary procedure, and whether the College is required to permit the employee to be represented by an attorney in the appeal process. More generally, the question is raised concerning the formality which due process requires generally in such appeal proceedings.

K.A.R. 1-9-1 defines the objective and use of service ratings thus:

> "Service ratings shall be considered in determining salary increases and decreases within the limits established in the pay plan, as a factor in promotional tests, as a factor in determining the order of layoff, and in establishing the order in which names are to be placed on reemployment lists, and as a means of discovering employees who should be promoted or transferred, or who, because of their low service value, should be demoted or dismissed."

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K.A.R. 1-9-3 provides for appeals of ratings believed by the employee to be unfair:

> "If an employee believes that he has been unfairly rated, he may within five days after he has been informed of his rating, address an appeal in writing to the appointing authority, who shall designate a committee of officers and employees of the agency to hear the appeal. If the size of the agency permits, the committee shall consist of three or more and shall not include the initial rater or raters. The appeal committee shall consider such evidence as may be offered by the employee and the rater, and as it may secure on its own initiative and shall within five days sign a rating for the employee, which rating shall be final and not subject to further appeal."

Service ratings may have a significant effect on the employee's status. An employee with an unsatisfactory service rating shall not be admitted to a promotional examination. K.A.R. 1-9-6. An employee with a current rating below satisfactory, including the fair rating involved here, is not entitled to a salary increase within the authorized salary range. (We note that DA-226-7, the rating form we have reviewed, includes no rating of satisfactory.) If a service rating of unsatisfactory is assigned, and the employee does not make sufficient improvement in his job performance to receive a rating of fair or better, the service rating may be cause for dismissal. K.A.R. 1-9-10. A current service rating of fair or unsatisfactory may be considered by the appointing authority as sufficient reason for recommending a decrease in salary within the authorized salary range. K.A.R. 1-9-8.

If the regulation provided no appeal from a service rating, it may fairly be argued whether a rating, in and of itself, impairs any employee interest which is "encompassed by the Fourteenth Amendment's protection of liberty and property." In *Board of Regents v. Roth*, 408 U.S. 564 at 567 (1972), the Court stated thus:

> "The requirements of procedural due process apply only to the deprivation of interests

> encompassed by the Fourteenth Amendment's protection of liberty and property."

On the one hand, our own research has discovered no reported judicial decisions in which an employee's claim to or expectancy of a particular performance or service rating has been held, in and of itself, to constitute a liberty or property entitled to the full measure of procedural due process protection. On the other hand, certainly in particular factual circumstances, an adverse rating may seriously affect an employee's continued employment, eligibility for promotion, liability to demotion, and level of compensation.

However, this question need not be resolved as an abstract question of constitutional law. The provision for appeal afforded by K.A.R. 1-9-1 must be taken as an acknowledgment that service ratings may have a sufficiently serious potential for adverse consequences to an employee's status that an appeal procedure is necessary, as an element of fundamental fairness, to permit the employee an opportunity to be heard to challenge a rating which he or she believes to be unfair. The regulation permits such an appeal, and requires that in its prosecution, the employee be granted an opportunity to be heard. That opportunity must be a meaningful one, and the employee who seeks an appeal and a hearing under this regulation must be afforded those entitlements of due process which are sufficient to assure that it is.

In *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed.2d 287 (1970), the court stated thus:

> "'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L. Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)." 90 S.Ct. at 1020.

When an appeal committee is constituted, the committee must "consider such evidence as may be offered by the employee and the rater." The employee is entitled to timely notice of the

meeting of the committee, and an opportunity to be present, both to hear such evidence as may be offered by the rater, and to offer such evidence as the employee may choose to present. The regulation further provides that the committee "shall consider such evidence . . . as it may secure on its own initiative." The right of the employee to a hearing on appeal would be seriously weakened if the committee were free to gather and consider *ex parte* such evidence as it chose, unknown to the employee. It is an essential element of a meaningful opportunity to be heard that such evidence as the committee may procure on its own initiative be offered and presented at the hearing, in order that the employee may have an opportunity to be heard respecting that evidence.

It is commonly stated as an element of due process that one must have not only notice and an opportunity to be heard, but also notice of the grounds for action proposed to be taken. When an employee files an appeal from a rating which he deems unsatisfactory, the employee has notice of the *judgments* of the rating officer and of his *evaluations* of the employee's performance. The primary purpose of the appeal is not necessarily to determine the truth or falsity of particular facts, but the fairness of particular judgments. In particular cases, of course, such judgments may turn on precise factual occurrences. In other instances, a fair and helpful ventilation of the fairness of the rating, and the soundness of the employee's objections to it, may be distorted and frustrated by overemphasis on isolated factual occurrences and circumstances. The evaluation report, form DA-226-7, assures the employee of notice of the judgments on which the rating was based, and affords the employee adequate notice, in our judgment, of the grounds underlying the rating to respond thereto.

Lastly, in *Goldberg v. Kelly*, *supra*, the Court reiterated its view that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." The issues and questions to be heard in a rating appeal hearing may often not be complex or legalistic. And it is true that due process does not always entail representation by counsel. In *Goss v. Lopez*, ___ U.S. ___, 42 L. Ed.2d 725, 95 S.Ct. ___, 43 Law Week 4179 (1975), the Court held that although due process required that notice and opportunity for hearing be afforded to students faced with expulsion or suspension on the ground of misconduct, the formality of a full-dress hearing was not required, and counsel need not always be permitted:

> "On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination and allow the student to present his own witnesses. *In more difficult cases, he may permit counsel.*" [Emphasis supplied.]

However, the appeals committee obviously is unable to judge beforehand the complexity of any particular appeal it is to hear. The employee, in most instances, is the best judge of the value of the assistance of counsel, and in our judgment, the privilege to appear with counsel is an inherently necessary attribute of that meaningful opportunity to be heard which the regulation is designed to afford. It is not necessary, of course, that counsel must be provided the employee, but only that he be allowed to retain an attorney if he so desires. As pointed out in *Goldberg, supra,*

> "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient."

Accordingly, to recapitulate, we conclude that in an appeal by an employee from his service rating under K.A.R. 1-9-3, the appeal committee must hold a hearing of which the employee has timely notice and at which the employee is entitled to be present, represented by counsel if he so chooses, to present such evidence as he deems appropriate, and to hear all evidence considered by the appeals committee in the matter, whether presented by the rating officer, by another party, or gathered by the appeal committee on its own initiative.

You inquire whether, in light of the foregoing, the College should commence the appeal process anew. You advise that the appeal committee has been designated, and has talked to the rating officer and to the immediate supervisor of the employee. We see no need to constitute a new appeals committee. It is necessary, however, in the hearing to be held thereon, that any evidence or information heretofore furnished the committee by the rating officer or the supervisor which the committee will consider in disposing of the appeal be presented, in order that the employee have an opportunity to respond thereto.

Yours very truly,

CURT T. SCHNEIDER
Attorney General

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