



STATE OF WISCONSIN

PERSONNEL COMMISSION

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SHARON L. SCHMIDT, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

CORRECTIONS, *

Respondent. *

Case No. 91-0099-PC-ER *

* * * * *

DECISION
AND
ORDER

Nature of the Case

This is a complaint of retaliation for engaging in activities protected by the Fair Employment Act (FEA). A hearing was held on December 6 and 7, 1993, before Laurie R. McCallum, Chairperson.

Findings of Fact

1. Complainant was appointed to an Officer 1 position by respondent effective April 2, 1990; and assigned to participate in respondent's standard seven-week preservice program at the Corrections Training Center (CTC). Complainant requested to be assigned to Dodge Correctional Institution (DCI) after this preservice program but was assigned instead to Taycheedah Correctional Institution (TCI) effective May 27, 1990. These assignment decisions are not made by the individual institutions but by Gary Fergot at CTC.

2. Rookie Officers such as complainant are required to serve a six-month probationary period in addition to the seven-week preservice period. During their probationary period, they are designated as "Headquarters Officers" and are considered employees of CTC.

3. During 1990, Patricia Stockwell was the first shift supervisor and training captain at TCI. It was the practice at TCI at that time for newly assigned Headquarters Officers to spend their first two weeks being trained on the first and second shifts by a more senior Officer or supervisor. This on-the-job training (OJT) included review of post orders, house rules for each

building or equivalent unit, and written institution policies and procedures, as well as an institution tour. After this two-week period, Headquarters Officers are assigned to work particular posts. These post assignments may vary from day to day. Complainant's work schedule for her first two weeks at TCI indicates that she was assigned to on-the-job-training (OJT). During complainant's second week at TCI, the institution was in a lockdown. Complainant's work schedule for her third week at TCI indicates that she was assigned to a post the first two days of her work week and to OJT the last three days.

4. On June 27, 1990, complainant filed an internal agency complaint alleging that she had been discriminated against on the basis of her sex and age when she was assigned to TCI rather than DCI after her seven weeks at CTC. Complainant filed this complaint with respondent's central office and it was directed to Tara Ayres, Affirmative Action/Civil Rights Compliance Officer. In a memo dated July 12, 1990, to Gerald Berge, Administrator, Division of Adult Institutions, Ms. Ayres stated as follows:

A written complaint alleging discrimination on the basis of age and sex has been received from Sharon Schmidt of Taycheedah Correctional Institution. A copy of the complaint is attached. Greg Jones will be contacting the personnel manager to arrange investigatory interviews.

This memo indicated that a copy had been sent to two officials in respondent's central office and to Nona Switala who was then the Superintendent of TCI. This copy was received by Ms. Switala on July 17, 1990. Ms. Switala had no reason to advise any Officers or supervisors at TCI or anyone at DCI of the existence of this complaint and she did not do so. After Mr. Jones discussed her complaint with her, complainant decided that she didn't want it to be investigated and Mr. Jones did not discuss this complaint with anyone at TCI or DCI or conduct any type of investigation.

5. On June 28, 1990, complainant was assigned to the third floor of Addams Hall. During an evacuation of the building as the result of a fire alarm, complainant failed to unlock an inmate's door on her assigned floor and evacuate her. Complainant unlocked the doors of and evacuated all the other inmates on the floor. This was the subject of incident reports filed by Officer Schroeder, Officer Sweeney, and Captain Daleiden.

6. On July 3, 1990, complainant was assigned to the second shift on the third floor of Harris Hall. The post orders for this assigned post state that all

inmate doors were to be deadbolted at 9:30 p.m. The house rules for Harris Hall indicate that, at 9:45 p.m., inmates having "state T.V. privileges" are to be let out of their rooms and escorted to the T.V. room. Complainant followed this procedure but did not deadbolt the doors of the two inmates with state T.V. privileges after letting these inmates out of their room at 9:45 p.m. Officer Zehrer, who was the third shift officer who followed complainant on this post, discovered that these doors were not locked when she escorted one of these inmates back to her room. This was the subject of an incident report filed by Officer Zehrer and a conduct report filed by Captain Reimer, the third shift captain, on July 4, 1990, and was considered by TCI officials to be a serious breach of security. In her response to the conduct report, complainant indicated that she "may have let one inmate out for state T.V. . . . I believe I deadbolted the doors as I know this is the proper procedure. . . . I probably did deadbolt inmate Little's door." In her hearing testimony, complainant stated that she let the inmates with state T.V. privileges out of their rooms at 9:45 p.m. and shut their doors but did not deadbolt them because she didn't know she was supposed to.

7. On July 8, 1990, complainant was not scheduled to work. At 4:33 a.m. she was called at home by Captain Schaub and ordered to report for work for the first shift (6 a.m.-2 p.m.). Complainant indicated that she had a 6-year-old and a 7-year-old at home and that she didn't have a baby sitter to take care of them. Captain Schaub asked her if she would be able to find a baby sitter and complainant indicated that she would not. Captain Schaub advised complainant that she would have to write a conduct report for complainant's refusal of a direct order. Orders to report to work at TCI for unscheduled hours were common and Officers were expected to report in when called and to have made arrangements so that they would be able to report in. It was also the practice at TCI for supervisors, if they were advised that it would take time to make arrangements, to order Officers to report in as soon as possible. Captain Schaub stated that she did not do this because complainant had not indicated that she would try to arrange child care but had indicated to her that she would not be able to report in. In a pre-disciplinary meeting concerning this incident, complainant stated that, "My husband works at Dodge, he normally works 10 p.m. to 6 a.m.. He gets home at 6:30 a.m. but on this day he was working overtime and then went to help his brother." Complainant's husband, who was an Officer at DCI, was scheduled to work until 6 a.m. that day. He had

advised complainant that he would try to get overtime hours if he could and, if he couldn't, he intended to go and help his brother with a remodeling project for a few hours. Complainant did not attempt to call her husband before the end of his shift. Mr. Schmidt did not work overtime hours after his shift and helped his brother on the remodeling project until approximately 10:30 a.m.

8. Captain Schaub had informally counselled complainant one day while she was observing complainant's performance on an assignment in the cafeteria. Complainant had been assigned to "watch silver," i.e., to watch the inmates as they were taking their silverware to assure that each inmate took only one fork, one spoon, and one knife. Captain Schaub observed complainant not watching the silverware but turning away from the silverware location to talk and laugh with the inmates as they were going through the line. When Captain Schaub took complainant aside to discuss this with her, complainant denied that she had been inattentive.

9. On August 16, 1990, Captain Daleiden, the second shift supervisor, completed a Performance Planning and Development (PPD) report relating to complainant's performance for the period June 17 to August 17, 1990. In this report, Captain Daleiden rated complainant's performance as not meeting standards on 6 criteria, as meeting standards on 13 criteria, and as exceeding standards on 0 criteria; and stated as follows, in pertinent part:

Officer Schmidt was instructed to perform and document her required "pat-searches" and shower bath inspections, on a daily basis. There is improvement in this area at this time.

Could improve in her knowledgeability of post orders and Institutional policies.

Officer Schmidt needs to take her officer duties more seriously. She handles and treats the inmates as her "buddies"--lacks appropriate demeanor and authority in the supervision of inmates. Needs to also improve in the area of inmate accountability, i.e., left an inmate in the shower during a fire drill, failed to double lock an inmate's door after the official P.M. count.

* * * * *

Her peers report that she does not take direct or constructive criticism well. Staff cannot rely on her properly following her directions. If she doesn't understand--she doesn't ask for clarification--she just goes ahead and does what she thinks.

She has received a counselling regarding her refusal to come into work when she was ordered and not double locking an inmate's door.

* * * * *

During this review period, Officer Sharon Schmidt has worked mostly second and third shift utility post. At this time, she does not exhibit a consistently acceptable level of competence or responsibility in the discharge of her duties. She needs to improve in the following areas:

1. She needs to be more assertive and authoritative in the supervision of inmates.

2. Needs to establish professional interpersonal skills when dealing with inmates by overcoming being too friendly and gullible with them.

3. Needs to effectively learn to take directives and correction appropriately, learning by it, asking more questions when in doubt, not assuming.

This officer is being re-assigned to D.C.I. effective August 19, 1990. If she remained at T.C.I., and failed to display significant improvement in performance, I would have recommended termination of her employment.

10. Complainant was given an opportunity to respond to this PPD. In her response, complainant stated:

For one thing, I never left an inmate in the shower during a fire drill--get this straight!! Also get the double locked straight too. Look at the House Rules.

I have taken criticism very well and as far as friendly to the inmates--I treat everyone, staff and inmates, with respect--I don't get taken advantage of--the inmates respect me because I treat them like human beings not animals. I don't have a pen to do my job, my mouth does my work for me and I get results--I'm not a gung ho officer--I'm very fair and consistent. This backstabbing of staff to staff is ridiculous. I speak my mind and it's so terrible, I'm glad to go to an institution (Dodge) with better management and no backstabbing of each other.

You have evaluated the wrong person. I get along with my peers.

11. When Mr. Fergot at CTC learned of the performance problems complainant was experiencing at TCI, he decided to transfer her to DCI for the

remainder of her probationary period since he felt that complainant's strong desire to be at DCI may be affecting her work performance. Complainant's transfer to DCI was effective September 9, 1990.

12. The PPD prepared by Captain Daleiden was received and reviewed by Cathleen Nagle, DCI Security Director, upon complainant's transfer to DCI. Ms. Nagle meet with complainant to discuss this PPD and to advise complainant that her probationary status was very tenuous, that the slate had not been wiped clean by her transfer to DCI, that the TCI PPD was part of her probationary record, and that the areas which the TCI PPD indicated needed to be improved required immediate and substantial improvement if she was to successfully complete probation. Ms. Nagel observed that complainant talked throughout this meeting and didn't appear to be listening to what Ms. Nagel was saying to her.

13. Complainant received another two weeks of OJT at DCI and was then scheduled for post assignments. During her tenure, complainant generally got along well with other Officers who were generally of the opinion that her performance as an Officer was satisfactory. However, the following was observed in relation to complainant's performance:

a. Sgt. Zimmerman advised Lt. Arndt that he didn't feel that complainant had shown any interest in the training he had been providing her and that she didn't seem responsive to the directions he had given her.

b. Lt. Richards observed that complainant, when working the dining room, did not exercise enough control and stopped by tables to have conversations with the inmates which interfered with her attentiveness to her duties. Lt. Richards did not report this to Lt. Arndt.

c. Lt. Scheuler reported to Captain Waltz that Officer Dehaan had reported to him that, when he had been present on complainant's unit, he had observed that complainant had lost control of the inmates, there was a great deal of noise, the inmates were "playing games" with her, she would giggle when conversing with the inmates which angered them, and that she did nothing to correct the disruptive behavior of certain inmates. This was brought to Lt. Arndt's attention.

d. Sgt. Oleson reported to Lt. Arndt that complainant had unlocked the doors in her unit prior to the call for supper and he had observed that she did not have good control over the inmates; they were "playing games" with her by walking out in the hallway and calling for her; and, when she yelled at the inmates,

she laughed or giggled as well and, as a result, the inmates didn't take her directions seriously.

e. Captain Fitzpatrick, the second shift supervisor, reported to Lt. Arndt that complainant did not have a serious attitude when dealing with inmates, lacked assertiveness, and had difficulty controlling them; and that there was an unusual amount of movement, noise, and lack of control on her units.

f. Inmates had mentioned to Lt. Arndt that they had trouble getting reliable information or any information from complainant relating to their requests for advice relating to where they could go to get help with personal problems.

14. On or around October 4, 1990, Lt. Arndt, who was the Training Lieutenant at DCI, prepared a PPD relating to complainant's performance since her transfer to DCI. This PPD rated complainant's performance as not meeting standards on 8 criteria and meeting standards on 12 criteria and stated as follows, in pertinent part:

Officer Schmidt has not shown appropriate response to the Institution environment. She has shown lack of interest when being trained by fellow staff. She has displayed lack of control in the living units, and does not use the proper corrective measures to control the inmates' behavior. When inmates' concerns are brought to her, she responds nonchalantly and does not seem to realize the seriousness of her environment.

Officer Schmidt has not used the conduct report or incident report system to effect control, nor has she reported verbally to her supervisor when problems have arose.

Her behavior listed in her last PPD continues to be exhibited at DCI; even though she has had the opportunity to change it.

Complainant was given an opportunity to respond to this PPD and stated in her written comments that:

No tickets were needed to write. I always had control of every unit I was in. . . . It's almost the same as the last PPD I got from Taycheedah--I was told by Captain on 2nd shift that I was doing fine.

15. Complainant did not write an incident report, i.e., an informational report summarizing a situation an Officer or supervisor considers unusual or noteworthy; or a conduct report, i.e., a report of a conduct violation by an inmate, during her tenure at DCI. It was considered unusual for a rookie

Officer or any Officer or supervisor not to have observed anything unusual or noteworthy or not to have observed a conduct violation during this length of time.

16. Captain Nitschke, the second shift supervisor, was asked by complainant after his third day of working with her, whether he thought she was doing a good job. He replied that he had heard nothing bad about her.

17. In a letter dated October 8, 1990, Gordon Abrahamson, Warden of DCI, notified complainant that she was terminated from employment effective October 8, 1990, based upon her unsatisfactory work performance.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden to show that she was retaliated against as alleged for engaging in activities protected by the Fair Employment Act (FEA).

3. The complainant has failed to sustain this burden.

Opinion

The issue to which the parties agreed is:

Whether respondent retaliated against complainant for her fair employment activities when she was terminated in October of 1990 or in regard to the "deadbolt incident," the "refusal to work incident," or her PPD (performance planning and development) evaluation (See Initial Determination, page 8).

Under the FEA, the initial burden is on the complainant to show a prima facie case of retaliation; the burden then shifts to the respondent to articulate legitimate, non-discriminatory reasons for the subject actions; and, finally, the burden shifts back to the complainant to show that the reasons offered by the respondent are pretextual. McDonnell-Douglas v. Green, 411 U.W. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.W. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

To establish a prima facie case in the retaliation context, there must be evidence that (1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, (2) there was an adverse employment action, and (3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a

retaliatory motive played a part in the adverse employment action. Jacobson v. DILHR, 79-28-PC (4/10/81); Smith v. UW-Madison, 79-PC-ER-95 (6/25/82).

In the instant case, complainant participated in a protected activity through her filing of an internal agency complaint alleging discrimination in her assignment to TCI; was the subject of adverse employment actions, i.e., the conduct reports for the deadbolt and the call-in incidents, her unfavorable performance evaluations, and her eventual termination; and the proximity in time between the filing of the complaint and the adverse actions could lead to the conclusion that a causal connection existed. However, complainant has failed to show that anyone at DCI or at TCI other than Ms. Switala was aware that she had filed a complaint, has failed to show that Ms. Switala influenced the decisions which resulted in the subject adverse employment actions, and has failed to show that Ms. Switala advised any of the relevant decision makers or anyone who had input into these decisions of the existence of the complaint. In addition, it should be noted that both the deadbolt incident (July 3, 1990) and the call-in incident (July 8, 1990) occurred prior to the date on which Ms. Switala became aware of the complaint (July 17, 1990). The Commission concludes that complainant has failed to make out a prima facie case of retaliation.

If complainant had made out a prima facie case of retaliation, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its actions. Respondent has stated that the deadbolt and call-in conduct reports were issued due to the fact that complainant's actions were inconsistent with the security needs of the institution and violated post orders and the orders of her superiors; and that the PPD and termination were based on her unsatisfactory work performance. These reasons are legitimate and non-discriminatory on their face.

The burden then shifts to complainant to show that these reasons are pretextual. As stated above, both the deadbolt and the call-in conduct reports were prepared before anyone at TCI had any reason to be aware of the filing of the internal complaint. Moreover, there was ample evidence in the record to support respondent's contention that this failure to deadbolt inmates' doors was a serious breach of security. In addition, in regard to the deadbolt incident, complainant's description and explanation of her actions was inconsistent, i.e., in her response to the conduct report, she said that she knew that deadbolting the doors was the proper procedure and she probably did

deadbolt the inmate Little's door but, in her hearing testimony, complainant stated that she did not deadbolt the inmates' doors because she did not know that she was supposed to. The Commission does not find complainant credible in this regard. In regard to the call-in incident, respondent showed that they followed standard procedure. Complainant was asked by Captain Schaub if she could get a babysitter. Complainant told her that she could not so Captain Schaub did not explore any other possibilities. Complainant fails to adequately explain why Captain Schaub should have offered her the option of arriving late once she had made child care arrangements when complainant told her that child care arrangements could not be made. It was TCI's practice to require Officers to report in when called and to expect that the Officer has made arrangements to prepare for such unscheduled call-ins. Complainant has failed to demonstrate pretext in regard to the deadbolt and call-in incidents.

Complainant has also failed to demonstrate that the TCI PPD and the DCI PPD upon which her termination was based were not an accurate reflection of her performance as a rookie Officer. These were based in part on the deadbolt and call-in incidents in regard to which the Commission has already concluded the complainant has failed to demonstrate pretext. In addition, there was ample testimony in the record from Officers and supervisors, who had no reason to know of the internal complaint, that complainant's friendly interaction with inmates interfered with her attention to her duties (See Findings of Fact 8, 13.b., above), that she did not exercise good control over her units and the inmates on these units did not take her directions seriously (See Findings of Fact 13.c., 13.d., 13.e.), and that she did not take criticism or direction well. The record shows that these were consistent patterns in her performance which were noted by staff and supervisors in two different institutions and which were a sufficient basis for a probationary termination in a correctional institution. Complainant has failed to demonstrate pretext in regard to the PPDs and her termination.

Order

This complaint is dismissed.

Dated: February 3, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must

serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)