

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KIM HEMBROOK, Appellant,

vs.

DEPARTMENT OF CHILDREN AND FAMILIES, Respondent.

Case ID: 4.0000

Case Type: PA

DECISION NO. 35080-A

Appearances:

Kim Hembrook, N48W26389 Bayberry Court, Pewaukee, Wisconsin, appearing on his own behalf.

Amesia N. Xiong, Office of Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Children and Families.

DECISION AND ORDER

On August 4, 2014, Kim Hembrook filed an appeal with the Wisconsin Employment Relations Commission pursuant to § 230.44(1)(d), Stats., asserting that he had been suspended for thirty (30) days without just cause by the State of Wisconsin Department of Children and Families. The Commission assigned the appeal to Examiner Peter G. Davis for the purpose of conducting a hearing and issuing a proposed decision for the Commission's consideration. A hearing was held on October 16, 2014, in Milwaukee, Wisconsin, and by telephone on October 23, 2014. The parties filed written argument by December 18, 2014.

On February 25, 2015, Examiner Davis issued a Provisional Proposed Decision and Order reducing the 30-day suspension to a 5-day suspension and advised Hembrook of his opportunity to request fees and costs. Hembrook did so by requesting compensation for the time he spent preparing his case. DCF objected to the request arguing that it was substantially justified in its litigation position and that, in any event, a pro se, non-attorney appellant is not entitled to preparation time compensation. The Commission hereby denies Hembrook's request because pro se, non-attorney appellants are not entitled to compensation for time spent preparing a case. *Brooke v. UW System*, 99-0034-PC (5/2000).

DCF filed objections to the proposed decision of Examiner Davis and submitted a brief in support of its position. Hembrook filed a response on May 11, 2015. After review of the entire record and credibility consultation with Examiner Davis, the Commission issues the following:

FINDINGS OF FACT

1. The Department of Children and Families (“DCF”) is a State of Wisconsin administrative agency.

2. At the time of his April 21, 2014 suspension, Kim Hembrook had permanent status in class and was employed by DCF as an Initial Assessment Social Worker-Advanced. Hembrook worked out of an office building leased by the State. Since at least October 2013, the building owner had a sign at building entrances that read in pertinent part:

The Owner of These Premises Prohibits Carrying Firearms or
Other Weapons Beyond This Point.

3. In January 2014 Hembrook received a concealed carry license from the State of Wisconsin.

4. In February or March 2014, Hembrook approached a coworker in the State office building parking lot and lifted his jacket to show her his holstered handgun. The coworker was startled but not threatened by the encounter.

5. In March 2014, Hembrook knowingly brought an expandable baton into the workplace and showed it to a coworker and his supervisor. The coworker and supervisor were not alarmed or intimidated by the baton and took no action to report the matter.

6. On April 2, 2014, Hembrook responded to an emergency request that the safety of a baby be assessed. During Hembrook’s interaction with the mother and father of the baby, he did not display a handgun that was concealed on his person and he did not otherwise conduct himself inappropriately under the circumstances.

7. On April 3, 2014, Hembrook had a conversation with coworkers that began with a discussion about Hembrook’s possession of pepper spray. Hembrook made the offhand statement: “Who should I shoot?” The statement was neither threatening nor intimidating.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Hembrook's conduct which formed the basis for his disciplinary suspension did not violate any Department of Children and Families work rules.

2. The Department of Children and Families lacked just cause to impose discipline upon Hembrook.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

ORDER

The 30-day suspension imposed on Hembrook is rejected and the DCF shall make Hembrook whole in all respects, including, but not limited to, removal of the discipline from his file, including the fitness for duty evaluation.

Signed at the City of Madison, Wisconsin, this 13th day of July 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

DCF disciplined Hembrook as a result of four different incidents he was involved in. The examiner concluded that there was insufficient evidence to support two of the alleged rule violations but that the two other alleged rule violations should be affirmed. The examiner reduced the 30-day suspension to a 5-day suspension. We agree with the decision as it relates to the two actions that were rejected but separately find that the other two findings should also be rejected. We discuss each incident below.

Expandable Baton

Hembrook was disciplined in part for carrying an expandable baton into the workplace. The baton was concealed in his person. DCF does not have a work rule prohibiting the carrying of a concealed weapon on its premises. The owner of the building which the state leases has posted a notice that reads as follows:

The Owner of These Premises Prohibits Carrying Firearms or
Other Weapons Beyond This Point.

Hembrook acknowledged that he took the baton (and also pepper spray) into the workplace. His view is that the baton and the spray are not weapons. Hembrook did show his baton to his supervisor and received no negative response. The discipline for bringing the baton into the workplace was based upon DCF's interpretation of the landlord's rule. There is nothing in the record regarding the landlord's definition of the term "weapon." The appropriate way to handle this matter would have been to instruct Hembrook to stop bringing the baton to work. If he violated that directive discipline would be appropriate. The discipline was based upon DCF's speculation as to the intent of the building owner with no forewarning to Hembrook. That cannot stand.

Interaction with Coworkers

On April 3, 2014, Hembrook and two coworkers had a discussion that was triggered by Hembrook's possession of pepper spray. In the course of that conversation, at one point, Hembrook made the offhand statement: "Who should I shoot?" Hembrook then quickly added: "I probably should not have said it that way. I have a couple of difficult clients that I am dealing with." The two coworkers expressed concern about the statement and ultimately their "concerns" developed into the basis for discipline. As the examiner noted, the coworkers' "concerns" did not trigger immediate contact with law enforcement. Rather one of them sent an email to Hembrook's supervisor that read as follows:

I hate to say this, but your boy Kim just had the most interesting
conversation with Tina and I and we are a little concerned about

some of the statements that he made. We would love an opportunity to have a conversation with you about it.

The tenure and tone of that missive does not suggest that the coworkers were intimidated and harassed by Hembrook's offhand comment.

The examiner concluded that the coworker's concerns were not "unreasonable." We believe that misses the point. Hembrook was accused of violating a work rule that prohibited "intimidating and harassing" behavior. The fact that coworkers in their words were "a little concerned" does not translate into intentionally intimidating or harassing behavior. We conclude that Hembrook should not have been disciplined for this behavior.

Display of Pistol

The examiner found that Hembrook's action of showing a coworker a holstered pistol in the parking lot of the building did not cause her to feel threatened. In fact, the coworker never reported the incident until disciplinary proceedings against Hembrook were underway. The examiner found and we agree that this action did not violate DCF work rules.

Incident with Father of Baby

In the course of performing his job, Hembrook went to the residence of the parents of a baby that was subject to possible removal from the home. The visit was on an emergency basis. The examiner rejected the testimony of the father and chose to believe Hembrook's version of the events. We see no reason to overturn that credibility determination. We note that Hembrook's task of assessing and potentially removing an infant from the custody of the parents was clearly a volatile and potentially dangerous situation. The examiner concluded that Hembrook did not engage in threatening or intimidating behavior in his interaction with the father. We agree.

Final Observation

We understand the concern over violence in the workplace and that threatening behavior has no place in the employment setting. In this case, however, the rush to judgment seems inappropriate. Hembrook had a clean employment record and had received a meritorious service award. His decision to obtain a concealed carry permit and carry a concealed weapon while on duty was not prohibited by DCF. In fact, DCF had adopted a procedure acknowledging that such action was not prohibited.

In addition to a 30-day suspension, Hembrook was required to submit to a fitness for duty examination by a psychiatrist and was forbidden to carry a weapon while on duty. Given the record as a whole that strikes us as an overreaction. Hembrook and his coworkers, who are

required to go into homes and determine whether children are in peril, obviously perform a stressful and difficult job. We take that fact into consideration when evaluating this record.

Signed at the City of Madison, Wisconsin, this 13th day of July 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

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