

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HEIDI HILBERT, Complainant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0009

Case Type: PA

DECISION NO. 35683

Appearances:

Anthony J. Gunderson, Representative, Department of Corrections, 200 S. Madison Street, P.O. Box 351, Waupun, Wisconsin, appearing on behalf of Appellant Heidi Hilbert.

David A. Hart, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, Madison, Wisconsin, appearing on behalf of Respondent Department of Corrections.

DECISION AND ORDER

Heidi Hilbert filed a timely appeal with the Wisconsin Employment Relations Commission contesting her 10-day suspension for allegedly violating Department of Corrections Work Rules #2 and #28. Hearing on the matter was held on December 10, 2014, at the Taycheedah Correctional Facility in Fond du lac, Wisconsin. The hearing examiner was William C. Houlihan. The parties filed written briefs, the last of which was received by January 30, 2015.

On April 29, 2015, Examiner Houlihan issued a Provisional Proposed Findings of Fact, Conclusions of Law and Order reducing the suspension to a written warning. No request for fees or costs was received from Appellant Heidi Hilbert. No objections were filed and the matter became ripe for Commission action on July 2, 2015.

Based on a review of the evidence and argument the Commission issues the following:

FINDINGS OF FACTS

1. Appellant Heidi Hilbert is employed by the Wisconsin Department of Corrections and works as a Corrections Officer II at the Taycheedah Correctional Institution.

2. Respondent Department of Corrections is an agency of the State of Wisconsin and operates the Taycheedah Correctional Institution, a women's correctional facility.

3. Hilbert was suspended for ten days on May 6, 2014, for bringing a cell phone to work and for misleading DOC in the investigation of the matter. Hilbert had permanent status in class at the time of her suspension.

4. On April 14, 2014, Hilbert was interviewed as part of an investigation conducted by DOC into possession and use of cell phones on the premises.

5. Possession of cell phones by correction officers while on duty is contrary to policy.

6. Hilbert denied generally possessing or using her cell phone on the premises but admitted using it a "couple of times."

7. Within one-half hour of her interview, Hilbert disclosed to the investigator that she brought her cell phone into the premises regularly and used it to send personal texts and to make personal calls.

8. Many DOC employees have been disciplined for bringing cell phones into the DOC institution and misleading investigators in connection with investigations of such behavior.

Based on the above and foregoing Findings of Facts, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction to review this matter pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Corrections did not have just cause, within the meaning of § 230.34(1)(a), Stats., to suspend Heidi Hilbert for ten days.

3. The State of Wisconsin Department of Corrections did have just cause, within the meaning of § 230.34(1)(a), Stats., to issue Heidi Hilbert a written warning.

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

ORDER

The ten-day suspension is rejected and reduced to a written warning, and the State of Wisconsin Department of Corrections is directed to remove the discipline in question from Heidi Hilbert's record and to make her whole for all lost wages and benefits.

Signed at the City of Madison, Wisconsin, this 17th day of August 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This is another in a series of disciplinary matters arising out of the enforcement of DOC's policy prohibiting the use or possession of cell phones inside correctional facilities. There is no dispute that Hilbert violated the rule and that the violation was knowing. Hilbert's appeal is solely directed at her argument that she was disciplined more harshly than similarly situated colleagues both at Taycheedah (where she worked) and other correctional facilities.

As we made clear in *Morris v. DOC*, Dec. No. 35682-A (WERC, 7/15), in an appeal based upon disparate treatment in the administration of discipline we compare employees within a "group" consisting of employees subject to the same rules and with the same decision maker. We expand that group in situations where the employer has adopted a policy of broader uniformity in discipline. The DOC has established various procedures to insure that discipline is applied consistently throughout the department. It has created a system-wide Investigation Review Team that reviews proposed discipline for completeness and consistency. Additionally, Executive Direction 2 (R.Ex.109) limits the DOC to progressive discipline.

We recognize that a commitment of that level of consistency within a very large agency with a multitude of facilities is a daunting task. In any event DOC has adopted the policy and we examine claims of disparate treatment at DOC with it in mind.

At the time Hilbert received her ten-day disciplinary layoff she had a clean disciplinary record. Both sides produced documentation on the issue of disparate treatment. Jasmine Probst was investigated at the same time as Hilbert. Unlike Hilbert, Probst never acknowledged her level of cell phone usage. Probst received a ten-day suspension as well.¹ Another officer who was investigated in this timeframe, Officer Patten, at first denied but later acknowledged usage which was at the same level as Hilbert. Patten was not disciplined at all.

The record revealed that five other employees from other institutions received discipline for violating the cell phone policy. Officer Aviles received a ten-day suspension, however, he had four prior work rule violations on his record. Officer Phend brought a cell phone to work and received a one-day suspension. She had one prior work rule violation. Officer Steudel brought his cell phone to work and also photographed the segregation unit at the facility in Green Bay. He received a letter of reprimand for sending text messages on his cell phone. Officer Merry received a three-day disciplinary suspension for using her cell phone at work and for using State mail and internet for personal purposes. She had a prior suspension of one day.

The best that can be said of this brief description is that DOC, despite its pledge of consistency, has been anything but. As we noted in *Morris, supra*, we are inclined to give the employer broad discretion in applying varying levels of discipline short of discharge to employees. A minimal explanation of a variance will suffice to justify apparently inconsistent treatment of discipline short of termination. Here, the DOC not only failed to produce any explanation for the inconsistency, it added to the mystery by introducing its own examples of

¹ There was no evidence as to Probst's prior record.

disparate treatment, The question of why Hilbert was advanced to step 5 of the disciplinary process remains just that – a mystery. Absent an explanation Hilbert moves back to step 1 and we order the conversion of the ten-day disciplinary layoff to a written reprimand.

We seldom have the situation where numerous employees have engaged in the same misconduct. Apparently, the “no cell phone” rule was widely violated and a crackdown in enforcement was widespread. There may be satisfactory explanations for the variance in discipline but none were presented in this hearing and, accordingly, we have no alternative but to modify this discipline.

Signed at the City of Madison, Wisconsin, this 17th day of August 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner