STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BRIAN THOM, Appellant,

vs.

Secretary, DEPARTMENT OF CORRECTIONS, Respondent.

Case 90
No. 68285
PA(adv)-152

Decision No. 32746-B

Appearances:

Richard Thal, Lawton & Cates, Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53707-2965, appearing on behalf of Appellant Thom.[1]

Andrea Olmanson, Assistant Legal Counsel, Wisconsin Department of Corrections, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of Respondent Department of Corrections.

INTERIM DECISION AND ORDER

On September 5, 2008, Appellant Brian Thom (Thom) filed a timely appeal of the decision by Respondent, Department of Corrections (DOC) to terminate his employment as a Supervising Officer 2 at John C. Burke Correctional Center, invoking the jurisdiction of the Wisconsin Employment Relations Commission (Commission) under Sec. 230.44(1)(c), Stats. The Commission designated Raleigh Jones, a member of its staff, as Hearing Examiner.

Prior to hearing, DOC and Thom filed cross motions for summary judgment, both of which were denied by the Examiner on May 26, 2009.

The Examiner held a hearing in Madison, Wisconsin on August 24, 25, and 26, 2009, on the issue of whether DOC had just cause to terminate Thom.[2] On September 11, 2009, DOC filed a post-hearing motion seeking a determination that the appeal was frivolous and an award of sanctions. The Examiner informed the parties that he would consider the motion in his proposed decision. The parties submitted post-hearing briefs, including arguments on DOC's motion, the last of which was received on November 4, 2009, closing the record. The

[1] Lawton & Cates informed the Commission on April 29, 2010 that it no longer represented Thom. Thom then proceeded *pro se*.

[2] The record does not indicate that a specific issue was formulated for the hearing. However, through their written submissions it is clear that both parties viewed the issue as whether there was just cause for the termination of Thom's employment with the DOC.

Examiner issued his proposed decision and order on March 29, 2010, concluding that DOC had just cause to terminate Thom but denying DOC's motion for sanctions. Objections to the proposed decision were filed by both parties and the last response was received on May 5, 2010. However, on November 8, 2010, Thom asked the Commission to reopen the hearing. DOC opposed the request by letter received, also, on November 8, 2010. On November 19, 2010, the Commission issued an order denying the request.

The Commission consulted with the Examiner regarding the demeanor and credibility of witnesses. After analyzing the record and arguments as a whole, the Commission substantially modifies the proposed decision, reverses the conclusion reached in the proposed decision regarding whether DOC had just cause to terminate Thom, and adopts the proposed decision's denial of sanctions. The Commission has modified the Findings of Fact by deleting irrelevant or unnecessary findings, consolidating related findings, and revising adopted findings of fact for clarity. Except where expressly noted, any modifications to the Findings of Fact are stylistic rather than substantive. The Memorandum has also been substantially reformatted and rewritten, largely to more clearly set forth and respond to the parties' arguments, but also to make stylistic changes. The revised language is intended to more clearly articulate the relevant underlying facts and the Commission's analysis.

For the reasons set forth below, the Commission concludes that there was not just cause for DOC's decision to terminate Thom's employment, but that there was just cause for imposition of a 30-day suspension without pay, probationary termination of Thom's status as a Supervising Officer 2, and return of Thom to a Supervising Officer 1.

Being fully advised in the premises, the Commission makes the following

FINDINGS OF FACT

1. Respondent Department of Corrections (DOC) is an agency of the State of Wisconsin with statutory authority to manage correctional facilities operated by the State of Wisconsin. The Wisconsin Department of Corrections administers Wisconsin's state prisons and supervises the custody and discipline of all prisoners in order to protect the public and seeks to rehabilitate offenders and reintegrate them into society. DOC operates maximum, medium and minimum security facilities. The rules for staff and inmates are different at each security level.

2. DOC maintains several facilities in the vicinity of Waupun, Wisconsin including Dodge Correctional Institution (Dodge), Waupun Correctional Institution (Waupun) and John C. Burke Correctional Center (Burke). Employees of these facilities who use State-owned vehicles to carry out official business often use a State gas pump to refuel the vehicles. The State gas pump is located close to the Burke parking lot. A key is required to unlock the pump before fuel can be dispensed. A copy of the gas pump key is soldered onto the key ring for DOC-owned vehicles.[3]

[3] The Commission adds the final sentence of this finding to more fully reflect the evidence in the record.

3. DOC hired Appellant Brian Thom in 1994. After working at several DOC facilities, Thom transferred to Dodge in December 2001 as a Supervising Officer 1, a position commonly referred to as lieutenant. He was at Dodge for about seven years. As a supervisor at Dodge, Thom oversaw both staff and inmates. Prior to the discipline that is the subject of this appeal, the only entry in his disciplinary record was a letter of reprimand in lieu of a one-day suspension in 2004 for "using sick leave when not permitted." Otherwise, Thom was considered a good employee while at Dodge.

4. While Thom was at Dodge, he was the key control supervisor and had unrestricted access to the key room. Thom knew that DOC had detailed rules at each of its prisons for maintaining and safeguarding keys. Thom either obtained the gas key for the State pump referenced in Finding 2 directly, or directed a subordinate key control sergeant to give him a copy of the key. After obtaining the key and without logging it or mentioning it to his supervisors, Thom placed it on his personal key ring in violation of DOC policy.[4] Gas keys are not issued to individual employees and Thom did not receive a gas key as part of a key ring assigned to him at any DOC facility. Thom did not travel as part of his job at Dodge. However, at the time he obtained the key, Thom knew that he was taking a promotion from Dodge to Burke and also knew he would be traveling while employed at Burke.

5. In April 2008, Thom was promoted to Supervising Officer 2, a position commonly referred to as captain or assistant superintendent. The promotion required Thom to transfer to Burke, where he started work on April 14, 2008. Burke is a minimum security facility for female offenders. The top administrator at Burke is the superintendent, who in turn supervises two assistant superintendents.

6. The Superintendent at Dodge sent Thom a letter congratulating him on his promotion and directing him to return all property to Dodge that had been issued to him while he was employed there. Thom complied, except he did not return the gas key.

7. On April 15, 2008, Thom participated in a one-day orientation in preparation for his promotion to Burke, during which he received the standard Wisconsin Women's Correctional System Personnel Orientation Packet including the Fleet Driver and Management Policies and Procedures Manual (Fleet Policy).

8. One of Thom's job duties at Burke was to plan and monitor off-grounds programs for inmates, including inmate work-release programs. This job duty involved in-state travel to eight or nine work release sites located within an hour's drive of Burke. Thom was permitted to use either a State vehicle or his personal vehicle to perform this work. He normally opted to use his personal vehicle and reimbursed himself for work-related travel at Burke by simply replenishing the gas in his personal vehicle from the State gas pump. As a

[4] The previous two sentences have been modified from the proposed decision to more fully reflect the evidence in the record.

result, he did not keep a record of his mileage and he did not submit travel expense reports as required by the Fleet Policy. Instead, he based the amount of gas that he pumped into his vehicle from the State pump primarily on his visual observation of the gas gauge.[5]

9. The State gas pump may be used only by DOC employees and only to fuel State-owned vehicles. With one limited exception, set forth in a collective bargaining agreement that does not apply at any facility at issue in this case, it is not acceptable for DOC employees to pump fuel from a State gas pump into their personal vehicles.[6] When employees use their personal vehicles for official State business, the Fleet Policy requires them to submit travel expense reports in order to receive reimbursement for their mileage. This report requires that the employee specify the exact number of miles traveled on State business. Employees are then reimbursed at a uniform per-mile rate. The applicable per-mile reimbursement rate is based primarily on whether a State vehicle was available for use on the trip. If a State vehicle is available but an employee chooses to take his/her own vehicle, the reimbursement rate is lower than if a State vehicle is unavailable.[7]

10. Thom was familiar with travel expense reports as a means for reimbursement for work-related miles traveled in his personal vehicle. For example, he submitted one on June 16, 2008 after using his personal vehicle to attend a training class in Madison. He was also responsible for approving travel expense reports submitted by his subordinates.

11. A gas log book is kept on a clipboard next to the State gas pump. The log form has spaces for the employee to enter date, time, driver's name, agency, State vehicle number, mileage and number of gallons pumped. Prior to his transfer to Burke, Thom had fueled State–owned vehicles at the gas pump outside Burke and had logged the appropriate information.[8]

---

[5] Thom claims that before he transferred to Burke, a co-worker at Dodge told him that he would be able to reimburse himself in this fashion. All but one of the individuals that were identified by Thom as possibly having been party to such a conversation were called as witnesses at the hearing and each denied that the conversation occurred. The utter lack of any corroboration makes us question whether this conversation occurred. On the other hand, the openness of Thom's misconduct and his forthright acknowledgement when questioned about it lend credence to his claim that he believed himself authorized to disregard the rules about replenishing gas. Ultimately it is not necessary for us to decide whether or not Thom deliberately misled the Respondent in this regard. This (misleading) was not one of the grounds upon which the Respondent disciplined Thom. Further, even if the conversation did occur, a conversation with a coworker should not reasonably have led Thom to conclude that he was permitted to violate the Fleet Policy.

[6] This sentence has been modified from the proposed decision to more fully reflect the evidence in the record.

[7] The final sentence has been added to the proposed decision to more fully explain the basis for the Commission's decision.

[8] The Commission has added the information in this finding to provide additional relevant information regarding the logging procedure and Thom's past experience using the log.

12. On June 17, 2008 and June 24, 2008, sergeants at Burke observed Thom fueling his personal vehicle at the State gas pump without entering information into the log book. The June 24, 2008 incident was video-recorded by Burke surveillance equipment.

13. Reports that Thom had been refueling his personal vehicle at the State gas pump reached Burke's superintendent and assistant superintendent on June 25, 2008. The same day, Thom was interviewed by DOC management. In that interview and a second investigatory interview conducted on July 8, 2008, Thom forthrightly admitted that: 1) he had refueled his personal vehicle five or six times as reimbursement for his work-related travel, pumping six to ten gallons into his vehicle each time, 2) he had not asked Burke management if it was permissible for him to refuel his personal vehicle with State gas, 3) he obtained the gas key while still employed at Dodge, and 4) he had not properly filled out the gas log book when fueling his vehicle because he did not have the correct information to fill out the form.[9] He stated that a supervisor at Dodge had informed him that assistant superintendents at Burke could use gas from the State pump because they sometimes have to use their own personal vehicle for work-related travel. Thom could not identify with certainty the supervisor who allegedly provided this information.

14. DOC conducted an investigation into the allegations against Thom. In an Employee Conduct Report, the investigators concluded that, by taking the gas key from Dodge and then fueling his personal vehicle from the State pump, Thom violated three work rules: 1) Work Rule #2 – Failure to follow policy or procedure, 2) Work Rule #29 - Unauthorized or improper use of State or private property services or authorizations, and 3) Work Rule #30 - Theft or unauthorized possession of State or private property, equipment or materials.

15. A pre-disciplinary hearing was conducted on August 1, 2008 to give Thom an opportunity to refute the conclusions made in the investigation. At that hearing, the Employee Conduct Report was read aloud to Thom. Thom was also advised what work rules he was being charged with violating. Afterwards, Thom indicated he wanted to respond to the charges in writing and that he wanted his written statement to be vetted by his attorney. On August 5, 2008, Thom submitted a five-page written response to the allegations set forth in the Employee Conduct Report. The response reiterated Thom's belief that he was authorized to obtain the gas key and reimburse himself from the State gas pump for gas used in his personal vehicle while on State business.

16. After conducting the investigation and considering Thom's responsive arguments, DOC decided to terminate Thom's employment effective August 28, 2008. The decision was communicated to Thom in a letter dated August 28, 2008 from Cathy Jess, the

[9] The proposed decision also found that during the investigation, Thom stated 1) he had directed a subordinate sergeant to make him a key to the gas pump, that the sergeant complied, and that Thom then put the key on his personal key ring without logging it; and 2) on one or two occasions when he refueled his personal vehicle, he had recorded his name and the name of his employing institution on the gas log. Because Respondent's letter of discipline was not based on Thom's veracity during the investigation, the Commission has deleted the pertinent portion of the findings that were in the proposed decision.

Warden of the Wisconsin Women's Correctional System. The decision was based on DOC's conclusion that Thom violated DOC Work Rules #2, #29, and #30. The specific factual conclusions that led to the decision were outlined in the letter as follows:

- On at least five (5) occasions, including June 17, 2008 and June 24, 2008, you unlocked the state gas pump and placed state owned gasoline in your personal vehicle without authorization or approval of the JCBCC Superintendent, TCI Warden, Dodge Warden or WCI Warden. You took approximately between five (5) and nine (9) gallons of gasoline on each of the occasions.

- On June 17, 2008, you unlocked the state gas pump and placed over eight (8) gallons of state owned gasoline in your personal vehicle without authorization or approval.

- On June 24, 2008, you unlocked the state gas pump and placed over nine (9) gallons of state owned gasoline in your personal vehicle without authorization or approval.

- While still employed as a lieutenant at Dodge, you took a state owned gas key from Dodge and placed the key on your personal key ring without anyone's knowledge. You did this without authorization or approval.

- You used the state owned gas key which you took to unlock the state gas pump so that you could put state owned gasoline in your personal vehicle. You did this without authorization or approval.

- You failed to follow policy and procedure regarding the possession and use of a state gas key, use of state owned gasoline, and logging of the use of gasoline.

17. Certain aspects of the Fleet Policy are not always strictly followed or enforced by DOC. One DOC superintendent does not obtain a Vehicle Non-Availability Certificate when using her personal vehicle for State business, enabling her to be reimbursed at the higher non-availability rate without meeting that requirement.[10]

[10] The Commission adds this finding of fact to more fully set forth the factual basis for our decision. As will be discussed later, we do not reach any conclusion about whether the superintendent violated the Fleet Policy. We merely find that DOC failed to refute evidence presented at hearing that DOC does not uniformly and strictly enforce every requirement in the Fleet Policy.

18. Thom was never authorized to have his own key to the State gas pump or put State-owned gas into his personal vehicle.[11]

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Sec. 230.44(1)(c), Stats.

2. Respondent Department of Corrections has the burden to demonstrate that there was just cause for the imposition of discipline and for the degree of discipline imposed.

3. Respondent has demonstrated that there was just cause for the imposition of discipline, but failed to sustain its burden to demonstrate that there was just cause for termination.

4. The termination of Appellant's employment was excessive and is modified to a 30-day suspension without pay, probationary termination of Appellant's status as a Supervising Officer 2, and return of Appellant to a position as Supervising Officer 1.

5. Respondent has the burden of establishing that Appellant's appeal of his discharge is frivolous and that Respondent is entitled to an award of fees and costs under Sec. 227.483, Stats.

6. Respondent has failed to sustain that burden.

---

[11] The proposed decision also included a finding of fact that "Thom's taking of the state-owned gas key and using it to unlock the state gas pump and put gas into his personal vehicle was not merely the unauthorized or improper use of state property; it was theft." As explained in the Memorandum, the record does not establish that Thom was economically advantaged by his conduct in a manner commonly associated with the term "theft." It indicates he used the key and the pump to replenish, with State fuel, personal gasoline used in the course of State business. Accordingly, the Commission is unwilling to label Thom's conduct as "theft." As discussed in the Memorandum, however, the Commission's decision in this matter does not depend upon whether or not Thom's conduct is properly viewed as "theft". The Commission has also deleted a finding relating to Respondent's typical response to "theft" as compared to "unauthorized use" of State property. The Interim Decision is focused more on specific comparisons of misconduct that relate to the Appellant's actions.

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

ORDER

Respondent's decision to discharge the Appellant is modified to a 30-day suspension without pay, probationary termination of Appellant's status as a Supervising Officer 2, and return of Appellant to a position as Supervising Officer 1. The Appellant will be provided an opportunity to submit a request for fees and costs pursuant to Sec. 227.485, Stats. The Commission retains jurisdiction for purposes of determining whether an award of costs and fees is warranted and to resolve issues that might arise relating to remedy. A representative of the Commission will contact the parties to schedule a telephone conference.

Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of December, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Terrance L. Craney did not participate in the consideration of this matter.

Department of Corrections (Thom)

MEMORANDUM ACCOMPANYING INTERIM DECISION AND ORDER

In DEPARTMENT OF CORRECTIONS (DEL FRATE), DEC. NO. 30795 (WERC, 2/04), we identified the legal standard to apply when analyzing an appeal of disciplinary action under Section 230.44(1)(c), Stats.:

> On appeal of a disciplinary matter, the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. Section 230.34, Stats., requires . . . just cause. The Courts have equated this to proof to a reasonable certainty by the greater weight or clear preponderance of the evidence. REINKE V. PERSONNEL BOARD, 52 Wis. 2D 123, (1971); HOGOBOOM V. WIS. PERS. COMM., (Dane County Circuit Court, 81CV5669, 4/23/84); JACKSON V. STATE PERSONNEL BOARD, (Dane County Circuit Court, 164-086, 2/26/79). The underlying questions are: 1) whether the greater weight of credible evidence shows the Appellant committed the conduct alleged by Respondent in its letter of discipline; 2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline; and 3) whether the imposed discipline was excessive. MITCHELL V. DNR, CASE NO. 83-0228-PC (Pers. Comm. 8/30/84). In considering the severity of the discipline to be imposed, the Commission must consider, at a minimum, the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to have a tendency to impair the employer's operation, and the employee's prior work record with the Respondent. SAFRANSKY V. PERSONNEL BOARD, 62 Wis. 2D 464 (1974); BARDEN V. UW, CASE NO. 82-237-PC (Pers. Comm. 6/9/83).

We find that the greater weight of the credible evidence establishes that Thom engaged in the conduct alleged by DOC in its letter of termination and that such conduct warrants the imposition of discipline.[12] However, we find that the greater weight of the credible evidence does not support the level of discipline imposed.

---

[12] In his objections, Thom raises several general concerns related to the investigation, including that one of the investigators was biased against him. Pre-termination due process is satisfied when the employee receives "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." CLEVELAND BD. OF ED. V. LOUDERMILL, 470 U.S. 532, 546 (1985). We find that the pre-disciplinary actions taken by DOC in this case satisfy these requirements. At an early stage of the investigation, DOC informed Thom of the accusations. Thom received a copy of the investigation materials outlining the evidence gathered, and Thom was provided an opportunity to orally explain his actions and submit written statements in support of his position. Thom cites no authority that establishes the due process concerns he raises against DOC violate these procedural rights.

1. The Alleged Misconduct

The conduct alleged to support the termination of Thom was laid out by DOC in its letter of termination and is described in Finding of Fact #16. Thom admits to engaging in the conduct. At the initial stage of the investigation process, Thom admitted that he had replenished the fuel in his personal vehicle using the State gas pump as an alternate method of compensating him for gas used while on State business. He admitted to doing this on at least five occasions. Thom also admitted that he obtained the gas key while employed at Dodge and kept it when he transferred to Burke.

Based on Thom's own admissions and a clear preponderance of the evidence presented, we find that Thom engaged in the conduct alleged by DOC in its letter of termination.

2. Just Cause

Given our conclusion that Thom engaged in the conduct alleged, we must next determine whether or not such conduct constitutes just cause for the imposition of some level of discipline. In the letter of termination, DOC decided that Thom's conduct violated three work rules, which state in pertinent part as follows:

> #2, Failure to follow policy or procedure. . . .;
>
> #29, Unauthorized or improper use of state or private property, services or authorizations, including but not limited to vehicles, [and] . . . keys, . . . while in the course of one's employment; or to knowingly permit, encourage or direct others to do so; and
>
> #30, Theft or unauthorized possession of state or private property; equipment or materials. . . .

A. Work Rule #2

Work Rule #2 requires employees to follow DOC policies and procedures. DOC alleges that Thom violated its key control policy, Fleet Policy, and gas log procedure. DOC has a strong interest in ensuring that keys to its facilities are properly created, logged, and assigned, and created the key control policy to address those interests. The potential consequences of keys being unaccounted for in a correctional facility are severe and have a direct relationship to the safety and security of the facility, inmates, DOC employees and the surrounding community. DOC also has a strong interest in ensuring accurate accounting of expenses associated with State-related travel. The Fleet Policy and gas log policy are reasonable steps taken to address those interests.

As the key control supervisor at Dodge, Thom was responsible for ensuring that the key control policy was followed.[13] The key control policy provides the key control supervisor with specific direction and authority when applying the policy. A review of the key control policy shows that there is no provision authorizing the key control supervisor to issue a gas key to an individual employee. In his testimony at hearing and in subsequent written arguments, Thom has not identified any authority that would authorize him, even as key control supervisor, to issue the gas key to himself. While the policy might not specifically prohibit the issuing or taking of a gas key, when crafting a policy DOC is not required to "anticipate every possible wrong turn that an employee might make." DOC (DEL FRATE), SUPRA. This is particularly true in this case where Thom was the individual supervisor entrusted with protecting DOC's interest in having a clearly and consistently enforced key control policy. By issuing himself a gas key without authority under the key control policy, Thom acted in violation of that policy.

The Fleet Policy provides only one method for employees to obtain reimbursement for business miles driven in a personal vehicle. In relevant part, Section 1.24 of the Fleet Policy provides: "When drivers use their private vehicles for State business, a Travel Expense Report . . . must be submitted in accordance with the policies of the employee's agency." Section F, Part 3.05 of the Appendix to the Fleet Policy provides further guidance on the reimbursement process, including methods for determining the number of miles eligible for reimbursement and the applicable reimbursement rate. The policy is clear that employees must fill out and submit a travel expense report and submit it for reimbursement at a per-mile rate set by the State. Thom received the Fleet Policy as part of his orientation at Burke and had received monetary reimbursement using the Fleet Policy procedure in the past. He admits that his actions in fueling his personal vehicle from the State pump were not in conformity with the Fleet Policy. We therefore find that Thom did violate the Fleet Policy.

Thom also violated the procedure requiring the logging of gasoline taken from the State gas pump. Dodge maintains a logbook at the gas pump for employees to document gas usage. When pumping gas into a vehicle at the State gas pump, employees fill out a log sheet that is kept at the pump. The log sheet presupposes that the entries will relate to a State vehicle and has columns for the employee to record the date, time, driver's name, agency, State vehicle number, mileage, and number of gallons pumped. Thom had filled out this information on the log sheet on prior occasions when he refueled a State vehicle. He did not fill out any of this information when he fueled his personal vehicle from the State gas pump. By not filling out the log sheet, he violated a known procedure to log information related to use of the State gas pump.

---

[13] There was conflicting evidence as to the specific manner in which Thom obtained the gas key, i.e., whether he cut it himself or whether he requested a subordinate sergeant to make it. The distinction is inconsequential. In either event, Appellant exercised his own discretion and authority as key control supervisor to obtain the key.

B. Work Rule #29

Work Rule #29 forbids the unauthorized or improper use of State property, services or authorizations. DOC alleges that Thom violated this rule by using the gas key to take gas from the State pump to replenish the gas used in his personal vehicle for work-related travel. By doing so without utilizing the appropriate reimbursement procedures, he acted in an unauthorized manner. Thom claimed that he believed he was authorized to reimburse himself by replenishing his personal vehicle with State gas, pointing to a conversation he had with a co-equal supervisor at Dodge. Even assuming that this conversation did occur, it would not have been reasonable for Thom to conclude from comments made by a Supervising Officer 1 at Dodge that he (Thom) would not have to follow established policies at Burke. We find that Thom knowingly engaged in unauthorized use of State property by using the gas key to refuel his personal vehicle from the State pump.

C. Work Rule #30

Work Rule #30 forbids the theft or unauthorized possession of State property, equipment or materials. DOC alleges that Thom violated the rule by 1) issuing himself the gas key and keeping it after he left Dodge, in violation of the directive that he return all Dodge property when he transferred to Burke, and 2) taking possession of State-owned gasoline in violation of policy. These specific acts of misconduct are the same as those alleged to have violated Rules 2 and 29, and, as discussed above, we have concluded that Thom engaged in the misconduct and knew or should have known it was not authorized. DOC characterizes this conduct as theft while Thom characterizes it as, at worst, unauthorized possession. Although the distinction between the two is relevant as to the severity of punishment, under either characterization, we find that Thom violated Work Rule #30.

In sum, from the evidence presented, including Thom's admissions, we conclude that Thom violated Work Rules #2, #29, and #30 and that DOC had just cause to discipline Thom for those violations.

3. Excessive Discipline

The analysis of whether the level of discipline was excessive evaluates, at a minimum, "the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to have a tendency to impair the employer's operation, and the employee's prior work record with the Respondent." DOC (DEL FRATE), DEC. NO. 30795 (WERC, 2/04), quoting SAFRANSKY V. PERSONNEL BOARD, 62 Wis. 2D 464 (1974); BARDEN V. UW, CASE NO. 82-237-PC (PERS. COMM. 6/9/83). The analysis includes consideration of the seriousness of the offenses, the impressions that the offenses could make on other DOC employees and inmates, the level of discipline imposed on other employees engaged in similar conduct, and the supervisory status of the wrongdoer. ID. We will evaluate the level of discipline by considering the major mitigating and aggravating circumstances identified in this case.

A. Aggravating Circumstances

DOC points to a variety of factors in support of its position that termination was the only appropriate level of discipline in this case. DOC credibly established that Thom knew or should have known that his actions of taking the gas key, taking the gas, and not filling in the gas log sheet violated DOC policy and procedure. As an employee and supervisor, he received copies of the relevant DOC policies. Evidence was presented showing that during his career at DOC he had previously submitted travel expense reports for reimbursement of business miles in his personal vehicle. He had also refueled state vehicles from the State pump and filled out the gas log sheet. As the key control supervisor at Dodge, he was aware of the proper manner in which to distribute and account for all keys in the facility. These policies allow DOC to maintain efficient and secure operations. By not following the policies, Thom impaired the effective operations of DOC.

DOC further argues that Thom should be held to a higher standard because he was a supervisor. By violating work rules, Thom's conduct set a bad example for subordinate employees. When a supervisor violates the policies that apply to all employees in a manner that favors the supervisor, it creates ill will between employees and management and produces impediments to the smooth operation of the facility. As a result, DOC is justified in holding its supervisors to higher standards than non-supervisory employees. DOC (DEL FRATE), DEC. NO. 30795 (WERC, 2/04).

DOC also argues that Thom's violations of the rules make him susceptible to being compromised by inmates and inhibits both his credibility and his ability to rehabilitate inmates. If an inmate is aware that a DOC employee is violating the rules, the inmate might blackmail the employee or point to the misconduct as an excuse for the inmate's own misconduct. On the facts of this case, we are not convinced that the nature of Thom's violations implicate this concern to a significant level. Even if inmates are familiar with the key control policy and Fleet Policy, it seems unlikely they would have been the first to discover that Thom was violating those policies. Respondent's argument that Thom could have been blackmailed is accorded little weight.

DOC concluded that Thom provided misleading information at various points in the investigation. The discharge letter mentions that Thom provided "incomplete or misleading information concerning your authorization to have taken the key or the gasoline." However, DOC did not list this behavior as a factual basis for the discipline imposed, nor did DOC cite Thom for a violation of a work rule regarding this behavior.

There is no doubt that Thom's violations of the work rules were serious, particularly considering his status as supervisor. In his leadership role, he was entrusted by DOC to ensure that the agency's policies were enforced and that the agency's interests underlying those policies were respected. In this case, the interests behind the policies that Thom violated were clear. Keys created in a correctional facility must be authorized and accounted for to ensure the security of the facility and of State property. The State has developed a policy and procedure so that employees are not over-compensated when using a personal vehicle for State

business. Gas that is taken from the employer's gas pump must be accounted for to ensure that it is being used for proper purposes. Thom's conduct demonstrated a serious lack of care in serving these important interests of his employer.

B. Mitigating Circumstances

Although we find that Thom committed serious violations of work rules and that those violations have a tendency to impair DOC's operations, particularly given Thom's status as a supervisor, we also conclude that mitigating factors support discipline that is less severe than termination.[14] Thom's work history with DOC indicates that he was a good employee over the course of his 14-year employment. Prior to the conduct in question, his sole discipline was a reprimand in lieu of a one-day suspension four years earlier.

Although DOC vigorously contends that Thom's conduct should be characterized as "theft" and that theft is routinely viewed as a *per se* dischargeable offense, we find that his misconduct does not rise to the level of theft, at least not in the usual sense of that word. To us, "theft" implies an ill-gotten gain or economic advantage to the perpetrator. Here DOC has not directly alleged, nor does the record reflect, that Thom took more State fuel than would replace the personal fuel that Thom had used on State business. The record in this matter indicates that DOC did not make a significant effort to correlate the amount of gas taken to Thom's work-related travels until after the termination decision had been made. The investigation report and termination letter do not make any reference to such an attempt. The information necessary to make the correlation would have included some reasonable approximation of 1) the number of gallons Thom took from the State pump, 2) the number of miles driven on state-related business, and 3) the fuel efficiency of Thom's vehicle. Prior to the termination, Thom was asked generally about his travels, including the number of work sites he visited and the furthest worksite that he visited. However, it was not until the discovery process, after the instant appeal was filed, that DOC attempted to gather specific information (such as travel timelines and locations, gas taken, or fuel efficiency) to determine whether or not the amount of gas that Thom took was at least roughly related to the number of miles that Thom drove for work. By that late date, the information had become stale and difficult to discover. Therefore, we cannot conclude on this record that Thom gained financially from his misconduct.

Even if Thom's conduct can be characterized as theft, DOC has not treated all theft-related misconduct with similarly severe discipline. For example, evidence was offered that two non-supervisory officers were found to be stealing an inmate's prescription medication. One of the officers was terminated when she did not admit to theft during the

[14] DOC has cited several cases in support of an argument that the Commission should not "second guess" DOC's decision to terminate Thom. However, those cases actually support our authority and obligation to "examine the record to determine whether the action taken was excessive." See RUFF V. STATE INVESTMENT BOARD, CASE NOS. 80-105, 160, 222-PC (PC, 8/6/81); BRICE V. DOC, 00-0136-PC-ER, 00-0172-PC (PC, 8/13/01); BOHL V. DOC, 93-00004-PC-ER (2/20/95). That is precisely what we have done here.

investigation. The other officer was not terminated, but rather was given a 30-day suspension. She was treated less harshly because she admitted to her conduct during the investigation. In this case, Thom also promptly and clearly admitted to his conduct, even before being presented with Respondent's supporting evidence.

In DEL FRATE, *supra*, the supervisor at issue had engaged in serious violations akin in seriousness to theft. He directly violated work rules even after receiving specific instructions to the contrary. His conduct involved obtaining a personal benefit from the use of inmate labor. The Appellant in that case had a work record similar to Thom's. However, instead of terminating the Appellant in that case, DOC issued a 10-day suspension without pay, a level of discipline that was upheld by the Commission.

DOC cites ENGLAND V. DOC, CASE NO. 97-1051-PC (PC, 9/23/97) as support for discharging Thom.. The appellant in ENGLAND was a supervisor terminated by DOC for ordering unauthorized license plates for personal use and engaging in unauthorized salvaging of defective gloves manufactured by inmates. Earlier, following the unauthorized license plate incident, DOC had issued a written warning citing three work rule violations, including the work rule prohibiting "stealing or unauthorized use" of state property. The appellant in ENGLAND was terminated only after the subsequent incident of the theft of gloves. In Thom's case, DOC did not issue an initial warning or other form of lesser discipline, but instead terminated Thom as soon as the fuel usage came to light. Further, the appellant in ENGLAND, was terminated only after the subsequent incident of the theft of gloves. In Thom's case, DOC did not issue an initial warning or other form of lesser discipline, but instead terminated Thom as soon as the fuel usage came to light. Further, the appellant in ENGLAND, unlike Thom, took State property with the intention of using it for personal economic gain.

Another mitigating factor is that, on this record, DOC does not appear to have been consistent in its enforcement of the Fleet Policy. The evidence indicates that the superintendent at Burke at the time Thom worked there failed to comply with one aspect of the State's Fleet Policy. This occurred when, after using her personal vehicle for State business, she obtained reimbursement at the higher per-mile "nonavailability" rate without submitting a non-availability slip and perhaps without meeting the standards for the higher per-mile reimbursement set forth in the Policy. Section F, Part 3.05(3)(b) of the Appendix to the Fleet Policy, provides that an employee will be entitled to the higher reimbursement rate for miles driven in their personal vehicle on State business if the round trip mileage is:

1. Less than 100 miles. Employees may be required to secure a non-availability slip, at the discretion of the appointing authority or designee.
2. More than 100 miles and the employee's agency issues them a non-availability slip because the agency maintains a central pool in the headquarters city.
3. More than 100 miles and if both the employee's agency and the DOA central fleet issue a non-availability slip because the agency's central pool and central fleet are located in the headquarters city.
4. Any mileage if there is no access to a fleet vehicle in the headquarters city.

5. Any mileage if these requirements are waived on an individual basis. The agency must demonstrate to DOA that a different set of mileage standards for issuing non-availability slips would result in a more cost-effective use of state vehicles.

Part 3.05(3)(d) provides that, absent meeting one of the foregoing five exceptions, the employee will be reimbursed at the lower mileage rate established by the DOA.

The superintendent testified that she uses her personal vehicle on long work-related trips where she travels alone. She also testified that she had been informed she would not need to obtain a non-availability slip because the amount of time she spends on the road would essentially make one of the facility's vehicles unavailable for other business. Even after this potential violation of the Fleet Policy was brought to DOC's attention at the hearing, no evidence or argument was offered to establish that the superintendent's use of her private vehicle fell into one of the five exceptions. It is certainly possible that the superintendant's actions in using her personal vehicle on long trips may address a valid operational concern, but it nonetheless indicates that DOC does not strictly and uniformly enforce the Fleet Policy.[15]

We agree with DOC that Thom acted wrongfully in taking the gas key and the gas. However, we find that terminating his employment is an excessive punishment for those actions. We base this conclusion largely on the fact that Thom was not shown to have gained financially from his actions, such as by submitting an expense report in addition to replenishing the gas in his personal vehicle. Nor was there evidence that Thom took more gas than he actually used in his work-related travels. Such evidence might have been sufficient to justify termination despite Thom's otherwise good work record. On this record, however, Thom's misconduct is more in the nature of a very misguided attempt to relieve himself of the bother of keeping track of his work-related miles when using his own car and then completing a travel expense report.

Nonetheless, Thom's misconduct was serious and warrants substantial discipline. There is no doubt that a supervisor in Thom's position should have verified that he had authority to put State gas in his personal vehicle under certain circumstances. His failure to do so was unreasonable and indicates a lack of judgment that is troubling for a high-level supervisor at a correctional facility. Even though the evidence strongly suggests that this lack of judgment was limited to this one repeated circumstance of misconduct and is not indicative of an entrenched lack of judgment, we have imposed a modified but still significant discipline in this case that is commensurate with how seriously we view the misconduct. It results in the maximum suspension that we are authorized to order and the retraction of a promotion that was

[15] We emphasize again that we do not reach a conclusion about whether the superintendent violated the Fleet Policy. We simply find that, once the DOC had heard testimony that the Fleet Policy was not uniformly enforced, it had the burden to refute such evidence. Based on this record, there is no evidence that the superintendent's use of her personal vehicle for business travel fell into one of the exceptions for being reimbursed at the higher non-availability rate.

clearly important to Thom, who had progressively advanced through the ranks at DOC and whose prospect of further progression has likely suffered a major setback.

In conclusion, our examination of the record leads us to conclude that the termination of Appellant's employment was excessive and that the discipline should be modified to a 30-day suspension, probationary termination of Appellant's status as a Supervising Officer 2, and return of Appellant to a position as Supervising Officer 1.

4. Respondent's Motion for Fees[16]

Following the hearing, DOC filed a motion contending Thom's appeal was frivolous. DOC seeks attorneys' fees pursuant to Sec. 227.483, Stats., which provides:

> (1) If a hearing examiner finds, at any time during the proceeding, that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner shall award the successful party the costs and reasonable attorney fees that are directly attributable to responding to the frivolous petition, claim, or defense.
> . . .
> (3) To find a petition for a hearing or a claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following:
>
> (a) That the petition, claim, or defense was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
> (b) That the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

In reviewing the Respondent's motion, we rely on our conclusions reached earlier in this decision.

While there are no reported court decisions interpreting the section, subsection (3) closely parallels the standard that applies for finding that a matter before a Wisconsin appellate court is frivolous.[17] HOLZ V. BUSY BEES CONTRACTING, INC. 223 WIS. 2D 598, 589 N.W.2D

[16] The Commission has substantially revised this portion of the proposed decision to more fully address the Respondent's arguments, but has not changed the conclusion that was reached in the proposed decision.

[17] As provided in Sec. 809.25(3), Stats.:

> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

633 (WIS.APP., 1998) is a leading case applying the appellate court provision to *pro se* litigants:

> The standard to be applied is an objective one: what should a reasonable person in the position of this pro se litigant know or have known about the facts and the law relating to the arguments presented. As with lawyers, a pro se litigant is required to make a reasonable investigation of the facts and the law before filing an appeal. 223 Wis. 2d 598, 608 (Citations omitted.)

In JANDRT V. JEROME FOODS, INC., 227 WIS. 2D 531, 597 N.W.2D 744 (1999), the court observed that a "claim is not frivolous merely because there was a failure of proof or because a claim was later shown to be incorrect." 227 WIS. 2D 531, 551. Doubts regarding frivolousness are to be resolved in favor of the party from whom recovery is sought. 227 WIS. 2D 531, 562.[18]

Without addressing the question of whether it is appropriate to examine specific arguments advanced by a party when ascertaining whether a "petition, claim or defense" is frivolous, none of Appellant's arguments relied upon in Respondent's motion qualify as frivolous. Our analysis assumes the perspective of a reasonable person in the position of the *pro se* Appellant until the point that Appellant retained an attorney, just prior to hearing. Appellant's pursuit of this matter from that point is reviewed in terms of a reasonable attorney.[19]

Respondent contends it was frivolous for Appellant to claim that he was never informed that using gas from the State pump "was not authorized when using said for State business." However, this contention was a legitimate argument tied to the knowledge that the pump may be used for replenishing gas in at least some vehicles, i.e. State vehicles, used to carry out State business. The contention also reasonably relates to the specificity of the Respondent's written policies.[20]

> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

[18] In JANDRT, the court was applying two other provisions, Sec. 802.04 and Sec. 814.025, Stats., the latter of which was subsequently repealed.

[19] In its objections to the proposed decision, Respondent also takes the position that the Commission should impose financial sanctions against the Appellant for lying under oath during his deposition and at hearing, in violation of Sec. 946.31 and 32, Stats., which relate to perjury and false swearing. The Commission has made no findings of perjury or false swearing and lacks authority to enforce either of these provisions. Even if the Commission agreed with the Respondent's characterization of Appellant's statements under oath, neither Sec. 227.483 or Sec. 230.45(1), Stats., grants power to the Commission to order the payment of costs for either false swearing or perjury.

[20] Respondent argues, in the alternative, that even if Appellant's appeal was not frivolous at the time it was filed, his arguments became frivolous once the Appellant had to confront the "law [that] was cited to him, chapter and verse" in Respondent's motion for summary judgment. The examiner denied the summary judgment motion after it was filed and the matter proceeded to hearing. Our conclusions in this and subsequent paragraphs as to the

Respondent argues that sanctions are appropriate because Appellant claimed DOC had not obtained "approval of the DOC Secretary" before using video surveillance to monitor "staff activities" as required by agency written policy. The activities in question, according to the Appellant's argument, were his actions at the gas pump that were recorded electronically. This is a legitimate, albeit technical, argument that is based on the specific language of Respondent's policy. We find it to be a reasonable argument given the facts of this case.

Respondent's third basis for contending the appeal was frivolous is Appellant's argument that his discharge was inconsistent with the level of discipline imposed in other cases reviewed under Sec. 230.44(1)(c), Stats. Nearly all appeals from the imposition of discipline include arguments comparing the level of discipline imposed on the appellant vis-à-vis discipline imposed (or not imposed) on other individuals. Comparisons are a necessary part of the excessiveness question. We expect parties in this type of appeal to disagree on the degree of similarity with the appellant's circumstances. The fact that the Respondent found some of the Appellant's comparisons to be unconvincing does not make Appellant's argument frivolous.

Finally, Respondent contends it was frivolous for Appellant to argue that discharge was inappropriate in light of his prior history of discipline. Thom did not misstate his work history. Past record of discipline is another factor that must be considered when determining whether the level of discipline imposed was excessive. In some circumstances, an employee's prior record may have little bearing on the outcome of an appeal. The Appellant correctly and persuasively argued that his prior record needed to be considered here. The argument was reasonable.[21]

We find no evidence in the record that Appellant's petition or his claims or defenses were "commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring" the Respondent. Sec. 227.483(3)(a), Stats. It is noteworthy that as a State employee with permanent status in class as a Supervising Officer 1, Thom had a property interest in his continued employment with the State. As a consequence, he had a due process right to a post-termination review of the discharge action by this Commission. He exercised that right by filing an appeal and it would have a chilling effect on an employee's appeal right

---

reasonableness of the Appellant's arguments do not change after the summary judgment motion was rejected.

[21] Although not mentioned in the objections to the proposed decision, Respondent's reply brief in support of its motion for sanctions suggests that two other arguments advanced by the Appellant during the course of this matter were frivolous: 1) his training upon being hired at Burke was inadequate; and 2) the person who conducted the disciplinary investigation was biased. We have rejected both of these arguments. Nevertheless, adequacy of training bears a reasonable relationship to the just cause question, and it is not uncommon for an employee who has filed a State civil service disciplinary appeal to advance a biased investigator argument. Neither argument was unreasonable for purposes of Sec. 227.483, Stats.

if sanctions were imposed in this case. Respondent had the burden of establishing just cause for the imposition of the discipline, including the degree of discipline that was imposed. We have concluded that the discharge was excessive discipline and that Appellant's pursuit of his appeal was not frivolous. Respondent's motion for sanctions is denied.

Dated at Madison, Wisconsin, this 8th day of December, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Terrance L. Craney did not participate in the consideration of this matter.

rb
32746-B