STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOSEPH J. GORDON, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 150
No. 71674
PA(adv)-227

Decision No. 33911-A

Appearances:

Attorney Ronald E. English III, Hippenmeyer, Reilly, Moodie & Blum, S.C., 720 Clinton Street, Post Office Box 766, Waukesha, Wisconsin 53187-0766, appearing on behalf of Joseph J. Gordon.

Mr. Michael Soehner, State of Wisconsin, Office of State Employment Relations, 101 East Wilson Street, Fourth Floor, Madison, Wisconsin 53703, appearing on behalf of the State of Wisconsin Department of Corrections.

On June 4, 2012, Appellant Joseph J. Gordon was discharged for his position as a correction officer at the Milwaukee Secure Detention Facility, a facility operated by the State of Wisconsin Department of Corrections. A timely grievance was filed and, on August 12, 2012, the Wisconsin Employment Relations Commission assigned Examiner John Emery to the matter. Examiner Emery conducted a prehearing on November 19, 2012 and a hearing on March 18 and 19, 2013. Following the hearing but prior to issuing a decision, Examiner Emery left the Commission's employ. The Commission subsequently appointed James R. Scott, Commission Chairman, pursuant to § 227.46(3)(a), Stats. Following credibility consultation with Examiner Emery and a review of the record, including the briefs, exhibits and the recording of the proceeding, I issue the following Decision and Order.

FINDINGS OF FACT

1. Appellant Joseph Gordon was employed by the Wisconsin Department of Corrections, Milwaukee Secure Detention Facility, as a corrections officer assigned to the third district.

2. Gordon had eleven years of service and was considered a competent officer with no identified performance issues.

3. The Department of Corrections is an agency of the State of Wisconsin.

4. The Milwaukee Secure Detention Facility (MSDF) provides parking for its employees in an attached, below ground parking facility consisting of three levels.

5. On April 7, 2012, two officers employed at the MSDF each had tires on their personal vehicles slashed while the vehicle was parked in the structure.

6. On April 9, 2012, four other officers each had a tire slashed on their personal vehicle while they were parked in the structure.

7. The incidents were reported to the City of Milwaukee Police Department and investigated by that agency. No arrests were made.

8. The DOC also investigated the matter and was unable to determine who slashed the tires.

9. During the course of the DOC investigation, at least sixteen witnesses were interviewed.

10. In the very early stages of the investigation, Gordon became the only suspect and he was interviewed three times by different members of the command staff.

11. Several statements by witnesses were contradicted by Gordon. In all such cases, the investigators believed the witnesses' versions rather than Gordon's.

12. No evidence was produced that Gordon slashed the tires.

13. On June 4, 2012, Gordon was terminated for violating Work Rule 6, which provides:

> Falsifying records, knowingly giving false information, or knowingly permitting, encouraging or directing others to do so. Failing to provide truthful, accurate and complete information when required.

14. The basis for the alleged rule violation was that Gordon made false statements during the three investigatory sessions he was involved in.

15. The allegedly false statements were denials by Gordon that he was physically present on the lowest level of the parking structure following the conclusion of the third shift on April 7, 2012.

16. Had Gordon admitted rather than denied the question regarding his location on April 7, 2012, it would not have established any wrongdoing on his part.

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

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to §§ 230.44(1)(c) and 230.45(1), Stats.

2. The Department of Corrections failed to prove just cause for the termination of Appellant Joseph Gordon.

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

ORDER

That the Appellant Joseph Gordon's discharge is rejected and that he be reinstated to his previous position. Further that he receive compensation as provided in § 230.43(4), Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

/s/ James R. Scott

James R. Scott, Chairman

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is a case involving the discharge of an eleven-year state employee who worked at the downtown Milwaukee Secure Detention Facility (MSDF). The Department of Corrections, which employed Appellant Joseph Gordon acknowledged that he was a good performer. Brief Resp. p.4.

On April 7, 2012, two coworkers of Gordon's each had a tire cut on their personal vehicles. On April 9, 2012, four more employees had a tire damaged on their personal vehicles. No one was apprehended for the acts, although apparently a thorough investigation was conducted by the Milwaukee Police Department. The management staff at MSDF began an investigation as well. They interviewed at least sixteen employees, examined security camera tapes and various other documents. Their investigative report is 50 pages long and attached thereto are 46 exhibits.

An examination of the report and exhibits (R.106, 107) leads to the inescapable conclusion that early on Gordon was targeted as the only suspect and that the month-long "investigation" was focused on finding some wrongdoing on Gordon's part.

Gordon was initially interviewed on April 11, 2012, with follow-up interviews on April 12 and May 2, 2012. He was placed on administrative leave on April 15, 2012, and forbidden to have contact with DOC staff. Each of Gordon's interviews began with his receiving *Garrity* warnings, signaling that he was a suspect.[1] All of the other individuals who were interviewed received no warning or received an affirmative statement that they were *not* suspected of any wrongdoing. Ex.R107, Ex.21-31, 37, 38, 40-42.

The fairness of the investigation conducted by the DOC was further undermined by the fact that Gordon's chosen representative, Officer Corey Brown, was quickly identified as a witness with information suggesting that Gordon might not be telling the truth. Ex.R107, p.14. Brown was allowed to continue as Gordon's representative even though he was providing the employer with information adverse to the interest of Gordon.

As a tenured employee, Gordon was entitled to a rudimentary "hearing" prior to the decision to terminate. That due process right included notice of the charges and the right to be heard. It did not extend to the right to counsel. *Panozzo v. Rhodes*, 905 F.2d 135, 140 (7th Cir. 1990). Internal policy of the DOC regarding disciplinary procedures specifically does not

[1] As an aside, the *Garrity* warning provided Gordon is an incorrect statement of the law. DOC would be well advised to rectify that problem for future investigations. *See gen. Garrity v. New Jersey*, 285 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); *Herek v. Police and Fire Commission*, 226 Wis.2d 504, 595 N.W.2d 113 (1999).

provide for the right of an employee to be represented by an advocate. Ex.R101, R102. That being said, the practice of allowing an employee to select a representative to assist in the representation of the employee's position suggests an enhanced level of fairness. To allow the employee to use the services of a coworker who is himself a witness providing adverse evidence is simply a poor practice. It suggests unfairness and undermines the witness's credibility. Gordon himself was relying on Brown both as a supporting witness *and* as his representative. Ex.R104. In fact, Brown had been privately interviewed by management staff as a witness and served prominently as a witness adverse to Gordon in this hearing.

Aside from the defects in the way this personnel transaction was handled, the fundamental problem is that the DOC failed to prove by a preponderance of the evidence that Gordon engaged in behavior that warranted discharge.

We start from the premise that the DOC could not and did not attempt to prove that Gordon vandalized the vehicles. There was no evidence that he did so and, furthermore, no evidence of any motive on his part to damage the vehicles of the particular employees. This left the DOC with the fact that Gordon's version of events was contradicted by two other employees. The DOC chose to credit the evidence offered by two coworkers and conclude that Gordon was lying. The decision led to the conclusion that Gordon intentionally lied and, as a consequence, he was discharged for violating a work rule requiring truthfulness.

The most significant defect in the conclusion that Gordon violated the work rules is the fact that the purported falsehoods bore no connection to any wrongdoing on Gordon's part. The parking structure where the employees parked at the DOC facility consisted of three levels underground.[2] The vehicles with tires which were damaged in the first incident (April 6/7) were located in the lowest level of the structure. Gordon, when he was initially interviewed, indicated that he did not know which level he parked on during the evening of April 6/7. Unlike some employees, Gordon parked in whatever spot was available. Gordon was questioned on April 11, 2012, four days after the incident, and understandably was unsure where he parked the evening of April 6, 2012. Witness Todd Wucherer, who was also interviewed on April 11, 2012, was certain he saw Gordon on the lower level of the parking structure, standing next to a red Chevrolet Impala. One of the vehicles discovered damaged on April 7 was a maroon Chevrolet Impala. Wucherer did not testify that he saw Gordon damage the vehicle. As of April 11, 2012, there was no apparent conflict between Wucherer's and Gordon's interviews.

On April 12, 2012, when Gordon was interviewed for the second time, he indicated in response to again being questioned about where he parked:

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[2] The levels were not identified by a numerical floor level but were identified by different witnesses using different answers, creating a somewhat confusing record.

> I don't know, I could possibly have parked on the first level. I mean the first level by where the state vehicles are parked not the lowest level.

Ex.R106, p.15/50.

On May 2, 2012, Gordon was interviewed for a third time. On that occasion, he indicated:

> I believe I parked on the 1st level not the basement over where the Warden and Security Director park. Across from the State vehicles. That's where I recall. It was between 2 vehicles.

Ex.R106, p.40/50.

A fair summary of Gordon's testimony is that he was initially uncertain as to where he parked but later came to the conclusion that he likely parked on the higher level. Gordon also unequivocally denied being on the lowest level, either on foot or in his vehicle.

Officer Brown was relatively certain he observed Gordon walk from the highest level down to the lower levels and then minutes later drive up from the lower levels. Brown, however, did not see Gordon at the lowest level where the acts of vandalism occurred.

It was the conflict between Gordon's version and the statements of Wucherer and Brown that led to the conclusion that Gordon lied. It is important to note that our job is not to judge credibility when evaluating whether an employee lied during an internal investigation. That determination is properly made by the employer and is judged against a standard of reasonableness. Our function is not to serve as a super-personnel department second guessing the employer's judgment. If the employer chooses to believe A over B and the decision is reasonable, we will not second guess that choice.

The problem the DOC faces is that Gordon's alleged falsehoods were essentially immaterial. Had Gordon admitted he was in the lower level, it would have proved nothing. The DOC would have been no closer to learning who damaged the tires. Clearly the "falsehood" did not impair the investigation. The investigators were convinced Gordon vandalized the tires, but his presence in the area where the subject vehicles were parked proved nothing.

When an employer is faced with an egregious act that clearly would warrant discharge, e.g., vandalism, and is unable to develop any evidence as to who committed the act, discharging a suspect for lying about an insignificant fact is questionable.

An employer is entitled to honest answers from its employees, and it is entitled to cooperation in the investigation of wrongdoing. Likewise, the employer should be able to expect that employees will not attempt to mislead or wrongly accuse others. However, when in the course of an investigation, if one employee's version of events differs from another's, the employer should tread carefully before deciding that one is lying and should be discharged, particularly where the purported falsehood is immaterial. That is what happened here and it leads to the conclusion that just cause for the discharge has not been established.

Dated at Madison, Wisconsin, this 19th day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

/s/ James R. Scott

James R. Scott, Chairman