

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

RACHEL KOESTER and
JUSTIN WITSCHERBER,,

FILED

MAY 3 2017

Petitioners,

DANE COUNTY CIRCUIT COURT

v.

Case Nos.

(16 CV 0937)*
16 CV 0938✓

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

RE: [WERC Dec. No. 33992-B]

Respondent.

DECISION AND ORDER ON JUDICIAL REVIEW

STATEMENT OF THE CASE

This is a chapter 227 review of two decisions of the Wisconsin Employment Relations Commission (WERC), which affirmed petitioners' discharge from employment with the Department of Corrections for just cause under the Wisconsin Civil Service Law. See Wis. Stat. ch. 230, subch. II. Petitioners Rachel Koester and Justin Witscheber seek reversal of WERC's decisions, alleging that the agency prejudiced their substantial rights; that its administrative findings, inferences, conclusions, and decisions were contrary to the petitioners' constitutional rights and privileges; that the agency made errors of law; its procedure was flawed; the decisions were unsupported by substantial evidence in view of the entire record; and the decisions were arbitrary and capricious. See Pet. for Judicial Review of Agency Decision, ¶ 4, April 5, 2016; *Koester*, Case 170, No. 71823 PA(adv)-264, Decision No. 33992-B March 11, 2016; *Witscheber*, Case 172, No. 71825 PA(adv)-266, Decision No. 33994-B, March 11, 2016. Petitioners' Dane County cases numbered 16CV0937 and 0938 were consolidated before this court. The issues have been fully briefed and are ripe for review.

FACTS

The Department of Corrections previously employed Koester as a correctional officer and Witscheber as a sergeant at the Oakhill Correctional Institution (OCI). In July 2011, eight correctional officers were transferred to OCI

from Ethan Allen School, a closed juvenile correctional facility. One of the eight officers was Officer "Z" (not his real initial).

Officer Z committed suicide on March 30, 2012. After reports of bullying were brought to the Warden's attention by other correctional officers and Officer Z's wife, DOC conducted a fact-finding inquiry and disciplinary investigation to determine whether correctional officers had violated work rules by harassing Officer Z. Based on its investigation, DOC discharged Koester and Witscheber, as well as others, for violating DOC work rules. Exs. A18, A24; R. A149-51, 258-60.¹

Koester and Witscheber appealed their discharges to WERC. A WERC hearing examiner, Stuart Levitan, conducted a consolidated hearing on their appeals, as well as a third discharged DOC employee, over sixteen days from July 8 to October 11, 2013. The examiner issued separate proposed decisions and sustained the discharges in both cases relevant to this review. The parties filed objections to the proposed decisions.

Due to allegations that Examiner Levitan engaged in improper conduct while encouraging the parties to enter into a settlement, WERC conducted a *de novo* review of Koester's and Witscheber's appeals, based solely on the evidentiary record. *Koester*, Dec. No. 33992-B, 2, n. 3; *Witscheber*, Dec. No. 33994-B, 2, n. 3. On March 11, 2016, WERC issued separate decisions on Koester's and Witscheber's appeals, concluding that DOC had just cause to discharge each of them.

STANDARD OF REVIEW

The burden is on the state agency that discharges an employee to show just cause existed to a reasonable certainty by a preponderance of the evidence. *Reinke v. Personnel Board*, 53 Wis. 2d 123, 132-33, 137, 191 N.W.2d 833 (1971). Just cause exists when an employee's conduct has a tendency to impair the performance of the employee's duties, or the efficiency of the group with which the employee works. *Safransky v. Personnel Bd.*, 62 Wis. 2d 464, 474, 215 N.W.2d 379 (1974). Likewise, conduct unbecoming a state employee that violates important and fundamental standards of propriety, and that is so flagrant or serious that retaining the employee will undermine public confidence in state service will sustain a finding of just cause. *State ex rel. Gudlin v. Civil Serv. Comm'n of City of W. Allis*, 27 Wis. 2d 77, 87, 133 N.W.2d 799, 805 (1965). WERC's task was to decide whether petitioners were actually guilty of the misconduct cited by the state agency, and whether the discipline imposed was excessive. See *Safransky* 62 Wis. 2d at 472.

WERC's interpretation of the "just cause" standard under the Wisconsin Civil Service Law is entitled to great weight deference. WERC is the agency

¹ The discharge letters referred to Officer Z as Officer "X."

charged by the legislature with the duty of administering the statute; its interpretation of the statute is long-standing; WERC employs its expertise or specialized knowledge in forming the interpretation; its interpretation provides uniformity and consistency in the application of the statute; the interpretation is intertwined with factual determinations; and it involves value and policy judgments about the obligations of employers and employees. See Wis. Stat. § 230.44-230.45; *Bd. of Regents of Univ. of Wisconsin Sys. v. State Pers. Comm'n*, 2002 WI 79, ¶ 43, 254 Wis. 2d 148, 174, 646 N.W.2d 759, 772; *W. Bend Educ. Ass'n v. Wisconsin Employment Relations Comm'n*, 121 Wis. 2d 1, 12-13, 357 N.W.2d 534, 540 (1984). Accordingly, WERC's conclusions of law must be affirmed if they have any rational basis. *Bd. of Regents of Univ. of Wisconsin Sys.* 254 Wis. 2d at 175. This is true even if the court were to conclude that another interpretation was more reasonable. *Id.*

WERC's findings of fact must be affirmed if they are supported by substantial evidence in the record. Wis. Stat. § 227.57(6); *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis. 2d 540, 562, 151 N.W.2d 617 (1967). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion after considering all the record evidence. See *Milwaukee Symphony Orchestra, Inc. v. Wis. Dept. of Revenue*, 2010 WI 33, ¶ 31, 324 Wis. 2d 68, 781 N.W.2d 674. It is not a preponderance of the evidence. *Id.* But, it has been described as more than a mere scintilla of evidence, and more than conjecture and speculation. *Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, ¶ 48, 278 Wis. 2d 111, 133, 692 N.W.2d 572, 582-83.

The agency's factual findings may be set aside only when a reasonable fact-finder could not have reached the findings from all of the evidence before the agency, including the available inferences from that evidence. *Milwaukee Symphony Orchestra*, 324 Wis. 2d at 83. Weight and credibility of evidence are matters for the agency, and not for the reviewing court, to determine. Wis. Stat. § 227.57(6); *Milwaukee Symphony Orchestra*, 324 Wis. 2d at 83. Where two conflicting views of the evidence each may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. See *Robertson Transport Co. v. Public Service Comm.*, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968).

ANALYSIS AND DECISION

The commission determined that DOC had just cause to discharge Koester and Witscheber for violations of work rules, including harassment of coworkers and lying. Petitioners have raised a slew of objections to WERC's decisions based on alleged procedural and interpretive failures. First, WERC's *de novo* review of petitioners' appeals satisfied the requirements of due process. Second, substantial evidence in the record supported the commission's findings of petitioners' misconduct. Third, WERC reasonably concluded that discharge

was not excessive discipline. For the reasons discussed below, I affirm WERC's decisions.

I. Petitioners' due process rights were satisfied by WERC's *de novo* review of the record.

Petitioners make somewhat vague claims that their constitutional rights have been impaired as a result of alleged procedural and ethical errors committed by the hearing examiner, and that this has prejudiced the outcome of their appeals. Their procedural complaints relate solely to the Examiner's proposed decisions and do not contest the fairness of the hearing. WERC adequately responded to these concerns by conducting a *de novo* review when issuing its own decisions. WERC stated clearly that, despite agreeing with Examiner Levitan's ultimate findings of fact and legal conclusions, it based its decisions upon an independent review of the entire record. I do not believe that WERC's decisions substantially adopted Examiner Levitan's work product such that they are tainted by any alleged misconduct at earlier stages of the appeal. My review is of WERC's findings of facts and conclusions of law, and I decline to look past them to reach those of the examiner. *See Busch, Inc. v. Indus. Comm'n*, 29 Wis. 2d 685, 692, 139 N.W.2d 652, 655 (1966).

II. Substantial evidence supports the Commission's findings that Koester and Witscheber violated DOC work rules.

Substantial evidence in the record supports the Commission's findings that Koester and Witscheber violated DOC's work rules against harassment of coworkers (Rule #12/13) and lying (Rule #6). Exs. A18, A24. In pertinent part, the rules read:

- #6 Falsification of 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. (Effective 02/26/2012)
- #6 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. (Effective 09/2004)
- #12 Verbally threatening, intimidating, demeaning, interfering with another employee, an inmate, juvenile, offender or the public. (Effective 02/26/2012)
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- #13 Harassment, including but not limited to harassment based on protected status (race, gender, religion, etc.), towards employees, the public, inmates, juveniles or offenders. (Effective 02/26/2012)

#13 Intimidating, interfering with, harassing, (including sexual or racial harassment), demeaning, or using abusive language in dealing with others. (Effective 09/2004)

(Emphasis added). WERC also found Witscheber violated Executive Directive 50, which prohibits DOC employees from saving and forwarding emails that contain derogatory comments involving race, gender, and sexual comments. Witscheber essentially admits this conduct. Ex. R105, 31; Tr. 2573:13-14, 2620:14-20. The chief grounds for discharge in both cases, however, were clearly violations of Rules #12/13 and #6.

WERC details specific incidents of harassment and statements made to, about, or in the presence of Officer Z, which were of a demeaning or sexually derogatory nature. *Koester*, Dec. No. 33992-B, 6-10. In certain instances, witness testimony did not establish whether Koester or another employee, Sergeant Sherri Mudd, made the specific comments in question. However, WERC found, by the greater weight of the credible evidence, in light of the entire record, other witness testimony, and weighing the other witness credibility against Koester's, that Koester a) engaged in a continuous pattern of harassment and intimidation of Officer Z and that she b) failed to provide truthful information with regard to these incidents in the course of DOC's investigation. WERC based its conclusions on testimony corroborated by multiple people and circumstantial evidence; not only on uncorroborated hearsay evidence, as petitioners argued.²

For example, several coworkers testified to witnessing Koester intimidating Officer Z or making demeaning or harassing remarks about him. Officer Eddy heard Koester call Officer Z a "snitch." Tr. 939, 953-55. Officer Tomaszewski heard Koester berating the Ethan Allen transfers as "fake-timers." Tr. 818-23. Officer Ross testified that Koester would tell him Z was untrustworthy, and that she and Witscheber would "mean mug" at Officer Z and whisper about him. Tr. 878. Officer Lapp testified that he would save food for Officer Z because Z was afraid to eat in the same dining area as Koester and Witscheber. Tr. 1570.

Additionally, Officer Ross heard Mudd make comments about Z being a snitch in Koester's and Witscheber's presence, while the two appellants "pretty much [acted] like he didn't exist and just ignore[d] him [referring to Z]." Tr. 841-42. Officers Mitchell and Kessler heard either Koester and/or Mudd make comments about Officer Z being a "snitch," a "cry baby," and "looking for some backdoor action" in one another's presence. Tr. 519-20, 522-23, 596. More broadly, Officer Ross and Sergeant Lyga testified that Koester and Witscheber both spoke badly about many coworkers. Tr. 623-24, 845-47, 878.

² Hearsay evidence may be considered in an administrative proceeding under Wis. Stat. § 227.45(1), but uncorroborated hearsay evidence alone does not constitute substantial evidence. See *Gehin v. Wisconsin Grp. Ins. Bd.*, 278 Wis. 2d at 118.

Thus, substantial evidence in the record supports that Koester not only intimidated Z and made harassing or demeaning comments specifically about him, but that, cumulatively, she participated in a pattern of harassment against him and other coworkers. Even if she did not make certain of the statements herself, Koester was present for them and lied about it throughout the investigation. Ex. R103, 12-14, 16-18. She denied hearing anyone call Z a "snitch," "fake-timer," "cry baby," "gay," or make comments alluding to anal intercourse. Ex. R103, 13-14, 17-18, 34-35, 38, 52; Tr. 140, 144, 150-52. WERC found other employees' testimony that Koester either made these remarks or that they were made in her presence more credible, inferring that Koester intentionally withheld information to cover up evidence of harassment.

Likewise, substantial evidence in the record supports the finding that Witscheber harassed and intimidated several coworkers, including Officer Z, as alluded to above. A few examples of such conduct include: Witscheber making remarks about a coworker's sexual orientation, mocking coworkers on the basis of personal or physical features, making sexually explicit comments about a coworker, and wishing death upon another coworker on several occasions. Ex. R105, 51-52; Tr. 527, 599, 621-22, 846-48, 850-51, 875, 940-41. Sergeant Lyga, in fact, cites Witscheber's repeated harassment (along with Koester's "chiming in") as a factor in her decision to leave employment with the DOC. Tr. 627. And, like Koester, Witscheber denied participating in any acts of intimidation or harassment, denied overhearing certain comments, and specifically denied harassing Sergeant Lyga. Ex. R105, 15-16, 29-30, 34; Tr. 49, 50, 67-68, 93-94, 2554, 2564, 2572.

It is within WERC's purview to make determinations about the weight and credibility of evidence, and to draw inferences from facts established in the record. See *Muskego-Norway C.S.J.S.D. No. 9* 35 Wis. 2d at 563. WERC found Witscheber's testimony not credible, disingenuous, and pervasively dishonest. Substantial evidence supports the conclusion that he and Koester both made demeaning and harassing comments about coworkers, behaved in an intimidating fashion, and lied about the conduct in question.

III. WERC reasonably concluded that discharge was not excessive discipline.

WERC reasonably concluded that Koester's and Witscheber's violations constituted just cause for termination. WERC need only have a rational basis for reaching its legal conclusions. See *Luetzow Indus. v. Wisconsin Dep't of Revenue*, 197 Wis. 2d 916, 922, 541 N.W.2d 810, 813 (Ct. App. 1995); *St. Croix Falls Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 186 Wis. 2d 671, 677, 522 N.W.2d 507, 510 (Ct. App. 1994). In this case, former DOC Secretary Hamblin testified that harassment and dishonesty pose a serious risk to safety and security within a correctional setting, and that this type of conduct has a tendency to impair the performance of employees' duties. Tr. 1228-30; See

Safranksy, 62 Wis. 2d at 474. He testified further that he considered the conduct in this case so egregious as to not warrant progressive discipline. Tr. 1231-32; See, e.g., *State ex rel. Gudlin* 27 Wis. 2d at 87. Moreover, he felt progressive discipline would not have been effective because the petitioners "vastly denied" any wrongdoing and refused to accept culpability. Tr. 1231-32.

Petitioners attack WERC's legal conclusions along three lines: 1) they claim that when an employer fails to prove every violation alleged in a termination letter, lesser discipline is automatically warranted; 2) they claim that lying cannot alone justify termination; and 3) they argue that WERC has inconsistently applied its own standards. Petitioner's first contention is without authority and is not even logical. If any proven violation of an employer's code of conduct meets the standard of just cause, then just cause exists, without regard to unproven allegations. Second, although WERC may look warily upon allegations of lying as a penalty enhancement, petitioners cite no precedent stating that "lying" cannot satisfy the just cause requirement as a standalone violation. It is easy to see how one big lie or many small lies could impair workplace operations, or be so flagrant as to damage the public's faith in state institutions.

Finally, WERC's decisions in these cases are neither arbitrary nor capricious. Petitioners argue that the outcomes of these cases differ from other examples. Once again, however, this court will not overturn agency decisions with a rational basis:

Although inconsistencies in determinations of an administrative agency arising by comparison are not proof of arbitrariness or capriciousness, if the deviation is so unreasonable as to be without a rational basis or result of an unconsidered, willful and irrational choice of conduct, the decision is an arbitrary and capricious one; agencies are not free to shift between decisions without a rational basis.

Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n of Wisconsin, 109 Wis. 2d 256, 263, 325 N.W.2d 867, 870 (1982). In the termination letters, DOC states it has a zero tolerance policy for harassment and places a strong emphasis on the integrity of staff and truthfulness. Exs. A18, A24; R. 150, 259-60. Certain egregious misconduct may result in discharge even for long-term employees with no prior disciplinary record. Indeed, WERC provided specific reasoning for why it concluded Koester's and Witscheber's conduct was more severe than others', claiming there was "no meaningful comparability" between Koester's and Witscheber's level of misconduct and that of three other DOC employees. *Koester*, Dec. No. 33992-B, 12; *Witscheber*, Dec. No. 33994-B, 8.

WERC is entrusted to make value and policy judgments about the obligations of employers and employees. On the basis of the entire record and the proven allegations, discharge is not so harsh as to shock the conscience. See *Lewis Realty, Inc. v. Wisconsin Real Estate Brokers' Bd.*, 6 Wis. 2d 99, 125, 94 N.W.2d 238, 252 (1959). As Secretary Hamblin's testimony highlighted, the

safe operation of a secure institution requires trust and honesty amongst staff. Koester's and Witscheber's behavior undermined relationships between coworkers and created unnecessary risks within the institution. The commission's serious response to the petitioners' pattern of harassment, intimidation, and dishonesty was rational under the circumstances.

CONCLUSION

Substantial evidence in the record supports the commission's findings. The commission drew reasonable inferences from the evidence, and reasonably concluded that petitioners' conduct satisfied the standard for just cause and that discharge was not excessive punishment in these cases. Even under the "due weight" standard of review, I would have to find that there was a more reasonable interpretation of the record than the commission's. See *UFE Inc. v. Labor & Indus. Review Comm'n*, 201 Wis. 2d 274, 286-87, 548 N.W.2d 57, 62 (1996). I do not believe that to be the case here. The commission was in the best position as the fact-finder to draw conclusions based on the entire record in these cases.

THEREFORE IT IS ORDERED For the reasons stated, Koester's and Witscheber's petitions are DISMISSED and WERC's decisions with regard to petitioners' discharge are AFFIRMED.

This order is final for purposes of appeal.

Dated this 3rd day of May, 2017.

BY THE COURT:



Richard G. Niess
Circuit Judge

cc: Attys. Victor M. Arrellano, Kurt C. Kobelt
AAG David C. Rice, AAG Corey F. Finkelmeyer