

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATTHEW SEILER, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 171
No. 71824
PA(adv)-265

DECISION NO. 33993-B

Appearances:

Victor Arellano, with Kurt Kobelt on the brief, Arellano & Phebus S.C., 1468 N. High Point Road, Suite 202, Middleton, Wisconsin, appearing on behalf of Matthew Seiler.

Julio R. Barron, Chief Legal Counsel and Andrea Olmanson, Legal Counsel, Department of Corrections, 3099 E. Washington Avenue, P.O. Box 7925, Madison, Wisconsin, appearing on behalf of the State of Wisconsin, Department of Corrections.

DECISION AND ORDER

Matthew Seiler, formerly a sergeant at the Oakhill Correctional Institution, appeals his October 2, 2012 discharge from employment with the State of Wisconsin, Department of Corrections for purportedly demeaning and harassing a coworker, allowing another coworker unauthorized access to his DOC computer account, and lying about his actions.

Hearing in this matter was held before Examiner Stuart Levitan on 16 days from July 8, 2013 to October 11, 2013. The 3,020-page transcript was ready for the parties by October 24, 2013.¹ The parties thereafter filed written arguments and replies, the last of which was received on January 6, 2014.²

¹The hearing in Seiler's appeal was consolidated with those of two other former Oakhill Correctional Institution employees, Officer Rachel Koester, who was discharged October 2, 2012, and Sergeant Justyn Witscheber, who was discharged on October 3, 2012, for purported offenses similar to and associated with Seiler's.

²Although the parties submitted consolidated briefs, we give individual consideration to each appeal.

Examiner Levitan issued a proposed decision on March 4, 2015 affirming the discharge.³ The parties subsequently filed numerous, timely objections and responses to each other's objections, the last of which was received July 27, 2015.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. The Department of Corrections ("DOC") is the State agency responsible for the operation of adult and juvenile correctional facilities, including the former Ethan Allen School for Boys ("EAS") and the Oakhill Correctional Institution ("OCI"), in Wales and Oregon, Wisconsin, respectively.

2. Matthew Seiler worked for the DOC from 2007 until his discharge on October 2, 2012, at which time he had permanent status in class.

3. Seiler did not demean or interfere with OCI Officer Z (not his real initial) by calling him gay and letting inmates believe Officer Z ogled them during strip searches.

4. Seiler did not knowingly give false information and otherwise fail to provide truthful, accurate and complete information about material matters under investigation when he denied making sexual comments about Officer Z.

5. Seiler did not permit OCI Officer Rachel Koester to access and use the DOC computer system ("WICS") under his profile in violation of DOC work rules and/or directives.

6. Seiler knowingly gave false information and otherwise failed to provide truthful, accurate, and complete information about material matters under investigation in violation of DOC work rules and/or directives.

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

³ This decision and order differs from the proposed decision issued by the hearing examiner both as to result and deletions of unnecessarily detailed and extraneous opinions.

It is alleged that Examiner Levitan engaged in improper conduct during his unsuccessful efforts to persuade the parties to enter into a settlement agreement. Because our consideration of this appeal is *de novo* and based solely on the evidentiary record, we need not and do not need to consider that allegation in the context of this decision.

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal 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 discharge Matthew Seiler but did have just cause to suspend him for ten days.

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

ORDER

The State of Wisconsin, Department of Corrections' discharge of Matthew Seiler is rejected and reduced to a ten-day suspension. The State of Wisconsin, Department of Corrections is directed to modify Matthew Seiler's disciplinary record and to make him whole for all lost wages and benefits.

Signed at the City of Madison, Wisconsin, this 11th day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This appeal is part of a consolidated proceeding regarding Sergeants Matthew Seiler and Justyn Witscheber and Officer I Rachel Koester who were discharged by DOC in October 2012. Cathy Jess, the Administrator of DOC's Division of Adult Institutions ("DAI"), found that each had committed a series of violations of several DOC work rules and/or directives, including demeaning, harassing, intimidating, and interfering with other employees, and failing to provide complete and truthful information, both contemporaneously and during a fact-finding inquiry and disciplinary investigation following the suicide of OCI Officer Z (not his real initial). This decision addresses only Seiler's appeal.

Section 230.34(1)(a), Stats., provides in pertinent part the following as to certain employees of the State of Wisconsin:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

... may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission ... if the appeal alleges that the decision was not based on just cause.

Matthew Seiler had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that the employee was guilty of the misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v Personnel Board*, 53 Wis.2d 123 (1971); *Safransky v Personnel Board*, 62 Wis.2d 464 (1974).

OCI is a minimum-security facility in Oregon, Wisconsin, just south of Madison. It houses about 700 inmates and employs about 250 security personnel over three shifts. At all times relevant, the warden of OCI was Deirdre Morgan.

DID SEILER COMMIT THE MISCONDUCT ALLEGED BY DOC?

The events leading to Seiler's discharge began when DOC closed EAS, a correctional facility for male juvenile offenders in Wales, Wisconsin, on July 2, 2011, and eight EAS staff transferred to OCI. EAS transferees faced the challenges of moving from a juvenile facility into an adult one, with all new job duties and reporting requirements and an entirely new kind

of offender. Although juvenile corrections is more dangerous for officers than adult corrections, some OCI officers derided the EAS personnel for having worked in a non-security classification. Officer Z, who had worked at EAS for 20 years, was among those to accept transfer to OCI. Rather than take a first shift position, to which his seniority would have entitled him, Officer Z took a patrol post on the 3:00 p.m. – 11:00 p.m. second shift where Seiler, Koester, Witscheber, and Correctional Sergeant Sherri Mudd already worked. Mudd and Officer Z were contemporaries, while the other three were about 20 years younger. Supervisors and coworkers all considered Officer Z a conscientious and hardworking employee, always seeking to improve.

In the late fall of 2011, following an incident with Mudd, Koester and Witscheber began to harass, demean, interfere with and intimidate Officer Z. On November 6, 2011, Officer Z and Mudd were to strip search a group of offenders returning from farm work. When Officer Z was ready to do the searches, Mudd was in a residential unit, Cottage 5, watching the end of the Green Bay Packers – San Diego Chargers football game, and she was late reporting for the assignment. After waiting a period of time, Officer Z called a supervisor for permission to conduct a pat search, which can be done by a single officer, rather than a strip search. While Officer Z was holding the telephone, Mudd arrived and concluded, erroneously, that Officer Z was reporting her for neglecting her duties.

Koester testified that shortly after the incident Mudd told her she had alerted Officer Z to the fact that she would be a few minutes late, and that when Mudd saw him with the telephone, she told Officer Z, “thanks for throwing me under the bus.” Officer Z made the following contemporaneous entry in a pocket notebook he kept: “gets upset I got approval to pat (-).” This encounter led Mudd to adopt a particularly hostile and demeaning attitude toward Officer Z and to refer to him repeatedly and publicly as a “snitch.” Mudd and Koester also took to calling Officer Z gay.

Harassment of Officer Z continued following an incident in November 2011 when an inmate rubbed his genitals during a strip search Officer Z was conducting on him. Officer Z followed DOC protocol in performing the search and wrote and submitted an incident report on the matter. Seiler, during the normal course of his duties, delivered a copy of the incident report to the inmate.

After Officer Z’s suicide on March 30, 2012, Morgan spoke to several officers on second shift and was informed Officer Z had been upset and was thought to be planning to transfer to a different shift. Several officers used the term “bullying” to describe the situation.

Morgan directed Deputy Warden Paul Ninneman to cause the creation of “a file for Officer [Z] fact-finding.” Three more officers subsequently offered information, including Officer Matthew Mitchell, who related to Ninneman and Captain David Hicks three incidents involving Mudd and Officer Z, including the November 6, 2011 incident.

On Wednesday, April 4, 2012, Seiler had an encounter with Sergeant Matthew Simes, who reacted angrily when Seiler told him that, due to his religious beliefs, and unlike many other OCI staff members, he would not wear an optional mourning badge for someone who had committed suicide. Seiler and Simes would file their accounts of their encounter at 6:06 p.m. and 9:21 p.m., respectively, on April 9, 2012, after which time the incident would have become known to supervisory and managerial personnel.

At 2:50 a.m. on April 5, 2012, third-shift Captain Michael Green sent Morgan an email in which he warned of “a staff war brewing” between those who were friends of Officer Z’s and those who were not, that “the entire 2nd shift is in disarray,” and that “everyone is choosing sides.”

Five hours later, Ninneman sent Morgan a summary of information he received from Officers Anthony Hakenson and Christine Hutsell and an interview he and Captain Hicks conducted with Mitchell at his request. Hakenson and Hutsell, both former EAS employees, reported the “strip search” incident with Mudd. Hakenson also “reported staff were calling Officer Z a fag.” Hutsell added that Officer Z had confided in her and Officer Carol Johnson about being harassed. Mitchell also cited the strip search incident and that Mudd would refer to Officer Z as “that fucking snitch.” None of these reports or accounts mentioned Seiler by name.

Late that afternoon, Seiler submitted an incident report of his April 4, 2012 encounter with Simes. Upon reviewing the report, Lieutenant Jon Peterson felt that it was more articulate and descriptive than the way Seiler would ordinarily write a report making him suspicious that someone else wrote it. Believing that it would be a violation of DOC Executive Directive 50 for Seiler to allow someone else to write an incident report while he was signed into WICS under his own profile, Peterson, on April 10, 2012, reviewed the videotape from the OCI lobby and concluded that Koester wrote the report for Seiler on Seiler’s computer in Seiler’s WICS profile.⁴

On April 16, 2012, Officer Z’s widow told investigators that Officer Z had been increasingly unhappy about work and showing signs of increasing stress. She said she knew about the strip search incident and related that “Mudd and ‘another female staff person’ would routinely ridicule and belittle [Officer Z] at work.” Officer Z’s daughter said she heard him say, for the first time, how unhappy the job was making him.

⁴ Seiler argues in his post-hearing briefs that § 885.16, Stats., the “Deadman’s Statute,” bars all investigative statements and hearing testimony in which witnesses purported to relate statements made by Officer Z. Seiler did not raise this objection at any time during the hearing in this matter. A proper objection invoking the Deadman’s Statute is an objection to the competency of the witness, not to the admissibility of the evidence to be offered by the witness. *See in re Molay’s Estate*, 46 Wis.2d 450, 459, 175 N.W.2d 254 (1970) (citing *Carson v. Beloit*, 32 Wis.2d 282, 288, 145 N.W.2d 112 (1966)). The failure to raise the objection results in its waiver.

At hearing, DOC submitted exhibits containing the notes of interviews conducted by investigators. Seiler complained about the preparation and use of some of the fact-finding and subsequent disciplinary interviews where there were widespread errors in the transcription. Several witnesses testified that statements attributed to them were inaccurate and frequently weighed against Seiler, Koester and Witscheber. For example, the record of Lieutenant James Logan's interview reports that "[h]e said that he believed that [Officer Z] had taken his own life due to the fact of how he was treated at work." However, when asked at hearing if he had made that statement, Logan replied, "No, I did not." Simes testified that the recap of his investigative interview was both "inaccurate" and "not complete," and represented "primarily an opinion of what I said," rather than his actual words. Under oath at hearing, Simes denied that he had said, "I don't really care for Koester," and that he had said Witscheber had a "big mouth." Simes characterized these statements as "obviously something that was added in as maybe an interpretation of what I said." Mitchell testified, "there was some of the things on here that just didn't look like stuff I really said. So it's hard to recall if that's what I said at all or not." This has been taken into account in instances where the parties rely upon hearsay statements in such exhibits without securing the testimony of the speaker or some other form of corroboration.

Seiler was discharged on October 2, 2012. The discharge letter encompasses the following allegations:

- *Harassment of Officer Z.*

By mid-March, Officer Z had come to believe that Seiler was filing a confidential report charging him of sexual misconduct with inmates, which Officer Z believed would lead to his arrest and firing. On March 30, 2012, Officer Z committed suicide. It would have been a malicious act, with tragic consequences, for Seiler to intentionally cause Officer Z to believe, wrongly, that he was filing such a report. Officer Z certainly believed he had, but that does not make it so. DOC has failed to establish by a preponderance of credible evidence that Seiler told Officer Z he was filing a confidential incident report about Officer Z engaging in inappropriate sexual conduct with an inmate.

Similarly, DOC has failed to prove that Seiler called Officer Z gay or harassed Officer Z in other ways. DOC presented hearsay evidence that Seiler harassed Officer Z and called him gay. In order for the Commission to base a finding upon hearsay, the hearsay evidence must be corroborated by other evidence. *Gehin v. Wis. Group Ins. Bd.*, 2005 WI 16 ¶ 8, 278 Wis.2d 111, 692 N.W.2d 572.

Aware of this problem, DOC asks the Commission to find corroboration based on the fact that Seiler committed such acts as a habit. DOC's argument on this point is essentially a concession that without such a corroborative finding we cannot sustain the charge that Seiler called Officer Z gay or that he harassed him. We agree with DOC that without corroboration

the hearsay testimony in this matter alone is not sufficient for us to find that Seiler called Officer Z gay or that he harassed him.

DOC alleges that because Mudd called Officer Z gay, Seiler must have also called Officer Z gay out of the “habit” of doing what Mudd did. DOC, however, points to no evidence in the record demonstrating that Seiler had a habit of parroting Mudd’s demeaning conduct toward Officer Z or others. Even if we accept DOC’s assertion that Seiler did not associate with Officer Z because Mudd did not associate with him, it is too much of a logical leap to conclude that Seiler called Officer Z gay or harassed him because Mudd did so. It is not necessary to further examine the application of habit evidence, because DOC has not introduced sufficient evidence to conclude that Seiler had any habit as alleged by DOC. *See* § 904.06(2), Stats.

We conclude the admissible, non-hearsay evidence does not support the charge that Seiler called Officer Z gay; made comments about Officer Z’s purported sexual orientation; and said, after performing a strip search with Officer Z, that Officer Z liked looking at the inmates and falsely denied doing so.

- *Failure to be truthful during the investigation.*

During the investigation into the circumstances surrounding the suicide of Officer Z, Seiler denied that Koester drafted the incident report regarding his April 4 encounter with Sergeant Simes. His version of how the report was drafted became more contrived and implausible each time he was questioned. Seiler maintained his denial as to Koester’s role during his testimony before Examiner Levitan. The video evidence presented at hearing demonstrates that, during the period of time the report was being drafted, Seiler made at most a few key strokes and was often away from the computer, while Koester was seated at the computer most of the time frequently typing. It is clearly Koester who drafted the incident report. Therefore, we conclude that DOC has met its burden of proof as to the allegation that Seiler provided false information during its investigation.⁵

DOES THE MISCONDUCT COMMITTED WARRANT DISCHARGE?

In summary, we have found that the preponderance of credible evidence is that Seiler provided false information regarding Koester’s role in the creation of an incident report that was submitted through his WICS account. It is appropriate for DOC to discipline Seiler for his dishonesty – particularly when it was so material and persistent. Providing false and/or incomplete information about material matters under investigation is a serious offense for a correctional officer. We believe that correctional officers, like law enforcement officials, are properly held to higher standards for truthfulness and integrity.

⁵ As to whether Seiler was logged into his WICS account when he allowed Koester to draft the incident report, we conclude that DOC did not provide sufficient evidence that such misconduct occurred.

In some circumstances, where the dishonesty is material to the employer's operations and persistent, discharge may be warranted. *See Phillips v. DOJ*, Dec. No. 35735 (WERC, 9/2015). In this matter, Seiler's dishonesty was evident and material to the investigation conducted by DOC. Seiler's dishonesty continued throughout the investigative process and during the hearing in this matter. The dishonesty impacted DOC's investigation and operations. However, while the dishonesty was certainly more than trivial, it alone does not merit discharge.

Nonetheless, Seiler's dishonesty was flagrant enough that his violation of DOC Work Rule #6 deserves more than a written reprimand (which by DOC's progressive discipline system, Seiler would receive for his first work rule violation). Acknowledging the serious nature of Seiler's offense, a ten-day suspension is appropriate.

Signed at the City of Madison, Wisconsin, this 11th day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner