

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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BENSON WALLS, Appellant,

vs.

WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 180  
No. 71868  
PA(adv)-274

DECISION NO. 34026-C

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**Appearances:**

Nicholas Fairweather, Hawks Quindel, S.C., 222 West Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of Appellant Benson Walls.

Jim Underhill, Director – Bureau of Labor Relations, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of Respondent Department of Corrections.

Appellant Benson Walls appeals the decision to discharge him from employment. The Wisconsin Employment Relations Commission assigned this matter to John R. Emery as the examiner and he conducted a hearing on March 6, 2013. Subsequently, Emery left the employ of the Commission and the matter was reassigned to Stuart D. Levitan. Examiner Levitan issued a proposed decision on July 13, 2013. Walls filed timely objections and the matter was fully briefed by the parties' representatives.

The Commission has reviewed the record in this matter, including the verbatim recording of the proceedings, as well as the written argument. Based upon its considered review the Commission issues the following:

### **FINDINGS OF FACT**

1. The Respondent Wisconsin Department of Corrections (DOC) is a state agency which operates prisons and correctional facilities, one of which is the Milwaukee Secure Detention Center (MSDF).

2. Appellant Benson Walls was employed at MSDF as a correctional officer. He was employed by DOC from October 2000 until his termination on October 25, 2012.

3. On September 28, 2012, Walls was assigned as the intake worker in the secure "Sally port" area. In that area, law enforcement and/or correctional officers would arrive and depart both with and without prisoners.

4. On that date, Amy Klarkowski, a probation and parole agent employed by DOC in the Stevens Point area, arrived at the MSDF Sally port. She was with Sergeant Christopher Salzer, an employee of DOC's Division of Community Corrections, assigned to Tomah, Wisconsin.

5. Klarkowski and Salzer were there for the purpose of transporting a juvenile prisoner who was housed at MSDF.

6. When Klarkowski and Salzer approached the intake area, Walls made a comment about pat down searches.

7. Salzer understood the statement to be that he would have to be patted down by Walls.

8. Neither Salzer nor Klarkowski were patted down prior to their entry into the facility.

9. Once inside the facility, Klarkowski became upset and was visibly in tears.

10. Within one half hour of their arrival, Klarkowski and Salzer left with the prisoner.

11. On October 1, 2012, Klarkowski sent an email to several DOC officials indicating that, at the time of her arrival at MSDF on September 28, Walls had informed her he would have to do a pat down search of her. She further indicated that he later advised her that it was a joke and that he did not intend to pat search her. Klarkowski reported that she was upset to the point of tears.

12. DOC began a formal investigation of the incident and after interviewing various persons concluded that Walls had engaged in harassment; exercised poor judgment and provided false information during the investigation.

13. Walls was discharged effective October 25, 2012.

**CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this appeal pursuant to § 230.44(1)(c), Stats.
2. The Commission is unable to issue a final decision in this matter because of deficiencies in the record.

**ORDER**

1. The proposed decision of Examiner Stuart Levitan is rejected.
2. The issue of whether there is just cause for the termination of Benson Walls is remanded to Examiner Peter G. Davis.
3. Pursuant to Wis. Stats. § 227.46(3)(a), Examiner Davis will have final authority to issue a decision on behalf of the Wisconsin Employment Relations Commission.

Dated at Madison, Wisconsin, this 23rd day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

## MEMORANDUM DECISION

This case involves the termination of a twelve year employee of the DOC arising out of a single incident that occurred on September 28, 2012. Other than the incident and the ensuing investigation, the employee had a good record. As in other cases that we have reviewed involving termination at the DOC, this situation involved an incident that would not normally warrant discharge but, in the DOC's view, was aggravated by subsequent falsehoods allegedly made by the employee. This notion of penalty "enhancement" resulting from denial or deception in the subsequent investigation has been viewed warily. See e.g. Gordon v. DOC, Dec. No. 33911-A (WERC, 2013). Nevertheless, we recognize the need in a law enforcement setting of truthfulness by those occupying positions of trust.

On the whole and for the reasons set forth below, we believe it necessary to reject the proposed decision of the examiner and remand this matter for a new hearing. The record is replete with problems and falls far short of what we need to render a considered judgment in this matter. Neither side acquitted itself well and their respective presentations fall short of our expectations. Our observations in that regard follow.

### 1. Failure to Call Agent Klarkowski

Although the State listed Agent Klarkowski as a witness, they did not call or produce her. No explanation for her non-appearance was proffered nor was one sought by the examiner or counsel for Walls. Obviously, she was a central figure in this controversy and much of what happened (or didn't happen) to her was offered in the form of hearsay. Had she been summoned to appear and provide testimony, many of the hearsay issues discussed *infra* could have been avoided. We also have the potential application of the inference that if a party fails to call a material witness within its control, the witness would have given testimony unfavorable to the party that failed to call the witness. See gen. Kochanski v. Speedway Superamerica, 2012 WI App. 118, 344 Wis.2d 519, 822 N.W.2d 736.

### 2. Reliance on Hearsay Evidence

Without objection, the examiner received into evidence documents which appear to be verbatim transcripts of investigatory statements rendered in question and answer format. No foundation was proffered, so we have no idea whether these are transcripts of verbatim recordings, summaries or some other compilation. They are unsigned. Additionally, a statement purportedly made by Klarkowski in email format was also admitted without objection. With the exception of portions of the statement from Walls himself, all of the statements are inadmissible hearsay under § 908.04(a), Stats.

Witnesses were permitted to testify as to statements Klarkowski made, as well as nonverbal behavior on her part. Most if not all of that evidence is hearsay as well.

### 3. Lack of Evidence of Knowingly Falsifying Information

Central to the discipline rendered in this case is the assertion that Walls knowingly falsified information in response to investigative interview questions. The termination letter focuses on four statements which Walls made during his interview which the DOC concluded were lies. R.117. Walls was asked during his investigative interview:

**Q10: Did you inform them that they would have to be pat searched prior to entering?**

A: I had a conversation with a transport sergeant about that. She could have been right there. I said the DOC is changing their policies. But I didn't pat search anyone.

The statement is not untrue. Walls admits telling Sergeant Salzer about "that" referencing a pat down search. Walls acknowledges Klarkowski could have heard it, and he states that he did not search anyone. Walls did not deny informing anyone they would be pat searched. If the DOC thought the answer was incomplete they could have followed up during the questioning.

Walls was asked "Did either of them indicate that they would allow you to pat search them?" To which he responded "No." The DOC considered this a falsehood. Per the interviews, Salzer indicated he extended his arms to permit the search. R.108. Klarkowski indicated she questioned the need. R.107. Neither stated that they would allow the search. Certainly one could construe the action of Salzer as indicating he would "allow" the search. It is equally possible that Walls interpreted the question to be whether the two verbally assented to the search. At best, this is a "falsehood" of minor consequence.

The third purported falsehood was the question "Have you ever made the comment 'She seems a little sensitive and ask if she was OK?'" To which Walls responded "No." R.117. Sergeant Salzer, during his interview, did assert that Walls made the quoted comment. While the statement by Walls is false based upon the statement made to Salzer, the "falsehood" is not particularly material to the investigation. Whatever Walls said or did which left the impression that he personally intended to pat search Klarkowski is what caused her obvious distress. The fact that Walls may have been concerned about Klarkowski's reaction to his "practical joke" is only materially relevant as it relates to Walls' statement that she was not initially offended by his quip.

Finally, the last purported falsehood consisted of Walls' response to the question "Did Agent Klarkowski appear to be upset (to the point that she started crying) by this incident?" After comments by Walls' representative, he responded "What?? No. The camera will show us slapping knuckles and laughing." The DOC concluded that the statement was false because the intake video showed Walls handing Klarkowski a tissue or paper towel, which she used to "wipe her eyes and face with." At best, the video is unclear as to whether Walls handed Klarkowski anything, but it does appear she is wiping her face briefly with a tissue. More importantly, however, Klarkowski indicated in her interview and her email statement that Walls did not hand her a tissue or paper towel. R.101, 107. She indicated that while she was "tearing up" she did not start crying until she was out of the Sally port area. R.107. That leaves us with a direct statement

by Walls that might have been contradicted by silent video which is hearsay and corroborated by another hearsay document.

As the foregoing demonstrates, much of the evidence of wrongdoing by Walls is built on a framework of hearsay. Section 227.45(1), Stats., provides that:

Except as provided in s. 901.05, an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901.05.

(Emphasis added.) While administrative agencies have the discretion to admit hearsay evidence, it is also true that “uncorroborated hearsay evidence alone does not constitute substantial evidence.” *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, ¶8, 278 Wis.2d 111, 692 N.W.2d 572. That is true even though the evidence may have been properly admitted. *Id.* at 52.

Central to the decision to discharge Walls was the fact that in DOC’s view Walls engaged in behavior which was demeaning and harassing to Klarkowski. Categorizing the comment as harassing and demeaning is entirely dependent upon Klarkowski’s reaction to the comment. Another less sensitive employee might have viewed it as a harmless joke. In fact, Salzer certainly did not view the proposed pat search as harassing and demeaning. He testified that he had been pat searched at other DOC facilities in the past.

On this record we lack substantial evidence to determine whether Walls’ behavior constituted a tasteless prank or intentional demeaning behavior. Without testimony from the “victim” and only hearsay to rely on, we cannot make such a determination. On the other hand, with appropriate evidence it may well be that Walls’ termination should stand. We are particularly cautious in this matter because of the importance of employee discipline in penal institutions. Accordingly, we are rejecting the examiner’s proposed decision and remanding this matter to another examiner with final authority under § 227.46(3)(a), Stats., to issue a final decision on the issue of whether just cause existed to warrant the discharge of Benson Walls.<sup>1</sup>

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<sup>1</sup> In our judgment, a grant of final authority will expedite the resolution of this dispute.

Dated at Madison, Wisconsin, this 23rd day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner