

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BENSON WALLS, Appellant,

vs.

WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 180
No. 71868
PA(adv)-274

DECISION NO. 34026-D

Appearances:

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

Karl R. Hanson, Attorney, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of Wisconsin Department of Corrections.

DECISION AND ORDER

On November 23, 2012, Benson Walls filed an appeal with the Wisconsin Employment Relations Commission pursuant to § 230.44(1)(d), Stats., asserting that he had been discharged without just cause by the State of Wisconsin Department of Corrections. The Commission assigned the appeal to Examiner John R. Emery who conducted a hearing on March 6, 2013. Subsequently, Emery left the employ of the Commission and the matter was reassigned to Examiner Stuart D. Levitan.

On July 13, 2013, Examiner Levitan issued a proposed decision affirming the discharge decision. Walls filed timely objections and the matter was fully briefed by the parties' representatives.

On July 23, 2014, the Commission issued Findings of Fact, Conclusions of Law and Order concluding that it was unable to issue a final decision because of deficiencies in the record and remanding the matter to Examiner Peter G. Davis with final authority to issue a decision on behalf of the Commission pursuant to § 227.46(3), Stats.

A hearing was held on October 1, 2014, in Milwaukee, Wisconsin. A stenographic transcript of the hearing was prepared. The parties filed written argument by December 2, 2014.

Based on my review of the evidence and argument, I make and issue the following

FINDINGS OF FACT

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

2. At the time of his discharge on October 25, 2012, Walls had permanent status in class and was employed by DOC at MSDF as an intake employee in a secure area used to pick up and drop off prisoners.

3. A pat search is utilized by DOC employees to determine if an individual has a weapon or other contraband. During a pat search, a DOC employee would touch an individual’s chest and groin areas. DOC policy does not allow DOC employees to pat search other DOC employees except in extraordinary emergency circumstances.

4. On September 28, 2012, female DOC employee K and DOC employee Christopher Salzer drove into the intake area where Walls was stationed. K had been to MSDF on several occasions when Walls was on duty. During one of those prior occasions, she heard Walls refer to her as “dessert” and, therefore, she was apprehensive about any interaction with Walls on this occasion. After getting out of their vehicle, Walls advised K and Salzer “I’m going to have to pat search you.” Reasonably believing that this was a new procedure, both K and Salzer assumed Walls was serious and followed his instructions (including raising their arms to the side) to physically ready themselves for such a search.

5. K asked Walls if a female DOC employee could conduct the search of her. Walls advised her that if he (Walls) did not conduct the search, a larger male employee would do so.

6. Shortly thereafter, K and Salzer realized that Walls was not actually going to pat search them. K was nonetheless upset by Walls’ conduct and began to cry in the presence of other DOC employees and prisoners inside the MSDF facility.

7. When questioned by DOC supervisors about his conduct on September 28, 2012, Walls was evasive and untruthful.

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

CONCLUSIONS OF LAW

1. By his conduct described in Findings of Fact 4 and 5, Walls violated DOC work rule 4, 13 and 14.

2. By his conduct described in Finding of Fact 7, Walls violated DOC work rule 6.

3. Based on Walls' violation of DOC work rules 4, 6, 13 and 14, the State of Wisconsin, Department of Corrections, had just cause within the meaning of § 230.34(1)(a), Stats., to discharge Benson Walls.

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

ORDER

The discharge of Benson Walls is affirmed.

Dated at Madison, Wisconsin, this 20th day of January 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

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.

Walls 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). The Commission's role is to make findings of fact which it concludes are "proven to a reasonable certainty, by the greater weight of credible evidence." As to discharge, the Court in *Safransky* observed that:

Only if the employee's misconduct has sufficiently undermined the efficient performance of the duties of employment will "cause" for termination be found.

Here, the State has met its burden of proof as to Walls' discharge.

Walls' Conduct on September 28, 2012

The credible testimony of K and Salzer (who witnessed the pat search episode and has no motivation to be untruthful), as supplemented by the video evidence of the September 28 interaction, combine to establish violations of DOC work rules 4 (exercise of bad judgment), 13 (sexual harassment), and 14 (horseplay, practical jokes, disruptive behavior) by Walls. While I doubt that Walls intended what he likely viewed as a practical joke to produce so much discomfort to K, he should have understood that his pat search comments were not being well received when K asked to have a female employee perform the search. Further, Walls response to that question, as recited in Finding of Fact 5, not only escalated the matter to a new level but also made clear that there was a sexual aspect to the situation. Thus, although Walls had opportunities to defuse the matter, he chose not to do so and, thereby, took his chances as to how

his conduct was being received by this particular female employee. It is clear that K was very upset by Walls' conduct and that her crying within the MSDF facility in the presence of prisoners had potentially disruptive security implications.

Walls' Responses During the Investigation

A review of the investigation reports, the testimony of the investigators, and Walls' own testimony make clear that Walls was both evasive and untruthful when answering questions as to the events of September 28, thereby violating DOC work rule 6 (knowingly giving false information – failing to provide accurate and complete information). Walls essentially responded to many questions by indicating that he did not pat search K. However, he was not being accused of actually pat searching anyone. Rather, Walls was being asked to describe his actions and those of K and Salzer. Thus, many of Walls' answers did not respond to the questions being asked and therefore were evasive.

When Walls was not being evasive, he was being untruthful. He denied telling K and Salzer that they would be pat searched. See Q14 and Q32, 10/10/12 interview. He denied that he told the two employees to put their arms out to the side. See Q16, 10/2/12 interview. He denied that K asked that the pat search be done by a female. See Q18, 10/2/12 interview. He denied telling K that a larger male employee would conduct the pat search if Walls did not. See Q19, 10/2/12 interview.

Impact of Walls' Misconduct

As discussed above, Walls' actions on September 28, 2012, and his responses during investigatory interviews violated DOC work rules. His conduct on September 28 evolved into sexual harassment and created potentially disruptive security implications. Walls' evasive and untruthful responses during the investigatory interviews compromised DOC's interests in his future credibility if he was called upon to testify in administrative or judicial proceedings. Therefore, I conclude that Walls' misconduct has sufficiently undermined the efficient performance of his duties of employment so as to constitute just cause for his discharge.

Dated at Madison, Wisconsin, this 20th day of January 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner