

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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GAIL ALLEN, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 210  
No. 72067  
PA(adv)-312

DECISION NO. 34110-A

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**Appearances:**

Marilyn Townsend, Attorney, 122 West Washington Avenue, Madison, Wisconsin, appearing on behalf of Gail Allen.

Jim Underhill, Director-Bureau of Labor Relations, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, Madison, Wisconsin, appearing on behalf of the Department of Corrections.

**DECISION AND ORDER**

Appellant Gail Allen was discharged by the State of Wisconsin, Department of Corrections. She appealed her discharge to the Wisconsin Employment Relations Commission and a hearing was held in Madison, Wisconsin, on September 9 and 10, 2014, before Examiner Raleigh Jones. The parties filed timely subsequent briefs and the record was closed on November 19, 2014.

Examiner Jones issued a Proposed Decision and Order upholding the discharge on April 13, 2015. Appellant filed objections to the proposed decision on May 13, 2015. Respondent filed its reply on June 5, 2015, and Appellant responded on June 15, 2015.

Based on a review of the evidence and argument, the Commission makes the following Findings of Fact, Conclusions of Law and Order:

### **FINDINGS OF FACT**

1. The Department of Corrections (DOC) is an agency of the State of Wisconsin and administers the Division of Community Corrections (DCC).

2. Probation and parole agents employed by DCC monitor individuals placed on court-ordered supervision. Agents monitor the rules of supervision and provide investigative services to aid in sentencing and community re-entry planning.

3. Gail Allen was employed and had permanent status in class as a probation and parole agent with the DCC for nine years until her discharge on March 15, 2013.

4. Allen was discharged for violations of DOC / DCC work rules.

5. Allen was in charge of the supervision of Chad Osterero during the time of the charged conduct. Osterero was on parole for being found guilty of false imprisonment and sexual assault.

6. While under Allen's supervision and with her knowledge Osterero was in possession, at his home, in clear sight, of paintball guns, a shotgun shell, rope, a ball-gag, whips, handcuffs, pornography, ceremonial daggers, corkscrews, graphic literature, swords, a cane, a blowgun, flails, and a battle axe.

7. Per DCC's policy, Allen should have confiscated and reported Osterero's items listed in Finding of Fact 6.

8. While under Allen's supervision, Allen received information that Osterero had committed sexual assault.

9. While under Allen's supervision, Osterero made threatening communications to another person of which Allen was aware.

10. Allen did not document, consult with a supervisor, implement mandatory custody, or request an exemption of mandatory custody as a result of the sexual assault allegation.

11. Allen deliberately interfered, misled, and obstructed DOC's investigation of her performance by giving false information.

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 to review this matter pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Corrections established just cause within the meaning of § 230.34(1)(a), Stats., to discharge Appellant Gail Allen.

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

**ORDER**

The discharge of Appellant Gail Allen is affirmed.

Signed at the City of Madison, Wisconsin, this 28th day of December 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner

**MEMORANDUM ACCOMPANYING DECISION 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.

Allen had permanent status in class at the time of her discharge and her appeal alleges that the discharge lacked 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).

DOC contends that Allen violated numerous work rules in regards to not documenting incidents involving Chad Osterero, a parolee under her supervision. Additionally, DOC alleges that Allen failed to report these same incidents to her direct supervisor in violation of DOC's procedure for mandatory reporting. Specifically, DOC alleges that Allen failed to initiate mandatory custody of Osterero following (1) an allegation of sexual assault by one victim and (2) the receipt of threatening communications by a second victim. DOC also asserts that Allen permitted Osterero to possess contraband at his residence. Finally, DOC claims Allen provided false and misleading information during the investigation of the above matters.<sup>1</sup>

Allen maintains that just cause is lacking for her discharge. Additionally, Allen claims that the progressive discipline appropriate for her actions has been ignored and that discharge is an excessive penalty.

**Factual Background**

Allen's conduct centers on two distinct incidents involving Victim A and Victim B.

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<sup>1</sup> Reference is made to a purported violation of DOC's "no fraternization" rule but no evidence of a violation was presented.

On April 12, 2012, Officer Romenesko of the Kaukauna Police Department contacted Allen informing her that a parolee under Allen's supervision, Chad Osterero, had allegedly committed sexual assault against Victim A. Romenesko informed Allen that she did not consider the alleged victim credible based on the prior romantic relationship between Osterero and the alleged victim and if intercourse had occurred it was likely consensual. Based on this representation, Allen concluded that a sexual assault had not taken place, yet still informed Romenesko that she would place a restraining order on Osterero barring him from future contact with the alleged victim. Allen subsequently failed to issue the order. However, she did contact Osterero and instructed him to have no further contact with the alleged victim. Romenesko contacted Allen a second time following an additional report from the victim concerning Osterero's behavior. Ultimately, the alleged victim independently approached the court seeking a restraining order against Osterero which the court granted.

Allen's supervisor, Ryan Peterson, ultimately became aware of the conduct of Osterero through one of Allen's coworkers and became alarmed at the alleged behavior. Peterson reviewed the internal notes on Osterero and found a single entry stating that Allen had received contact from the police regarding accusations from an ex-girlfriend. There was no mention of any other specifics relating to the incident in violation of DCC protocol. Peterson subsequently had Osterero arrested based on the alleged conduct. The district attorney subsequently declined to bring the case forward for criminal prosecution. Additionally, the revocation of Osterero's parole based on the alleged conduct was not upheld by an administrative law judge. In subsequent investigation of Allen's conduct, Allen represented that Victim A had never contacted her, although DOC telephone records show that the alleged victim attempted to reach Allen three times between June 8 and 19, 2012.

On October 9, 2012, Victim B left a message for Allen stating that she had been threatened by Osterero and that he was stalking her. Allen did not respond to the message. Allen failed to initiate mandatory custody of Osterero. On October 16, 2012, Victim B contacted Peterson and reported the threatening messages as well as Allen's failure to respond. After seeing the messages, considering the alleged victim's explanation of context and the fact that Osterero was being supervised as a sex offender, Peterson considered the communications threatening and had Osterero arrested.

When confronted regarding her inaction in the above, Allen claimed that she did not receive the Victim B's message until October 16, 2012, due to office and moving issues. DOC telephone records show that Allen received the voicemail left by the victim on October 9, 2012, and that Allen made phone calls to the victim on October 9 and 10, 2012. Allen eventually admitted that she did contact Osterero on October 9, 2012, and instructed him to cease contact with the Victim B.

On October 19, 2012, Peterson interviewed Osterero in jail, at which time Osterero admitted the conduct and stated that Allen had contacted him on October 9, 2012, telling him that he should not have any further contact with the victim. Osterero also admitted that he was in possession of contraband normally not permissible for a parolee to possess in his apartment and that Allen was aware of it and took no action.

During the October 19, 2012, jail interview, Osterero informed Peterson that he was on “easy street” and that Allen had told him that she “had his back.” Peterson went to Osterero’s apartment to investigate the self-reported contraband and found the items described, most in plain sight. These included paintball rifles, whips, ropes, swords, a mace, a mini bat, a ball and gag, handcuffs / restraints, a cane, a double-sided battle ax, blowgun, an empty shotgun shell, gas masks, corkscrews, rubber body parts, Halloween costumes hung ornamentally, fake skeleton heads, pornographic movies, sex toys, and bondage items and literature. Subsequent investigation found that during Allen’s supervision of Osterero, several of her colleagues who had visited the apartment raised concerns to Allen regarding the contraband specific to the criminal background of Osterero.

## LEGAL ANALYSIS

### **I. Failure to Investigate an Allegation of Sexual Assault.**

Allen contends that the alleged incident of sexual assault did not necessitate an investigation. Allen relies on Officer Romenesko concluding that the allegation lacked credibility, the decision of the district attorney not to pursue charges, and the ultimate decision of the ALJ disallowing revocation of Osterero based on his alleged actions.

Allen contends DOC’s policy of mandatory detention is discretionary on the part of the agent. The Department of Corrections, Division of Community Corrections Custody / Detention Procedure states:

#### .05 MANDATORY DETENTION

Wisconsin Administrative Code 328.22(1) requires that an offender be taken into custody and detained if the offender is **alleged** to have been involved in assaultive or dangerous conduct. This may include verbal threats ...

Any exception to this mandatory detention requirement shall be made only by the Regional Chief or the Chief’s designee. Supervisory approval is needed to release a mandatory detention offender from custody.

(Emphasis added.)

Allen admitted that the purpose of mandatory custody is to permit DOC to conduct an investigation to determine if there is any merit to the allegations that the offender has engaged in assaultive or dangerous conduct and, if so, whether the offender poses any risk of harm to themselves or the public. However, Allen argues that “with the benefit of hindsight we now know that it was neither necessary nor appropriate to take Mr. Osterero into custody.” Allen relies on Officer Romenesko’s statements and the ALJ’s refusal to revoke Osterero’s parole as a basis for relieving her of responsibility to pursue mandatory custody.

DCC's procedure does not contemplate the benefit of hindsight. The point of mandatory custody is precisely what its title implies. Allen was required to take Osterero into custody and she did not.

## **II. FAILURE TO REPORT THREATENING COMMUNICATIONS.**

Allen contends that the texts were sent to another individual (the alleged victim's boyfriend) and were not intended for Victim B.

Osterero's text messaging was clearly intended for Victim B. Remarks were made specifically referencing her vehicle and indicating Osterero was watching her from a distance on her porch. These remarks illustrate Osterero knew who he was communicating with. The ownership of the communication device is irrelevant. The language choices could reasonably infer physical threat. Peterson testified that he determined their threatening nature within thirty seconds of reading them. Whether there existed intervening text messages from Victim B to Osterero as Allen claims is immaterial as Victim B is not under DCC's supervision, allowing her a freedom that Osterero does not enjoy.

The DOC mandatory detention procedure previously discussed applies as forcefully here as it does to Allen's prior behavior. Allen was again derelict in not placing Osterero into custody and failing to properly document his actions.

## **III. CONTRABAND ALLOWED AGAINST DOC POLICY.**

Allen contends that only the items listed in her letter of termination should be under review due to DOC's omission of further detail in that document. Additionally, if the other items are allowed to be considered, Allen claims those other items were not visible upon her home visits therefore negating any claim of willful omission of reporting them. Wendy Schmidt of DOC also testified that during a home visit none of the items in question were present. Allen also contends none of the items should be labeled as contraband based upon Osterero's religious and artistic beliefs.

The level of specificity in the letter of discharge argued by Allen is not required. The letter's reference to contraband items is sufficient. Osterero testified that the items were present and openly visible at all times, stating he thought he had permission to have them due to the omission of any critique from Allen. Most compellingly, Shelly Van Thiel, Director of Adult Care Consultants, testified that she was with Allen on a home visit and not only saw the items but voiced her concern directly to Allen. Additional testimony from other DOC employees corroborated the open display of items.

With the presence of the contraband established, the only remaining issue is whether they were non-permissible items. Clearly, not all of the items should be considered weapons in a traditional sense. However, DCC's mission is twofold, namely public safety and re-entry services.

Osterero's probation resulted from a conviction of false imprisonment and sexual assault that included holding a knife to a woman's throat. The testimony of various witnesses accounted for the specific inappropriateness of the items in question, specifically the handcuffs and rope, given the parolee's past conduct. Osterero's past criminality involved threats and involuntary restraint. The items in question could be used to further those aims. The items created a potentially threatening environment for any visitor or could be used in furtherance or repetition of Osterero's past criminal behavior. The record established the items were inappropriate for Osterero to possess under DCC standards, and Allen failed in her duties by not documenting and removing the items.

#### **IV. INTERFERENCE WITH THE INVESTIGATION.**

DOC contends that Allen interfered, misled, or obstructed in the performance of DOC specific to the investigation of her actions.

Allen gave several statements claiming she had no communication with the victims. However, DOC phone records provided proof that Allen had been in communication with the victims. When confronted with the phone records, Allen recanted her previous statements.

The record supports that Allen was in violation of DOC's policy.

#### **V. LEVEL OF DISCIPLINE.**

Allen alleges that, even if she is found negligent in the performance of her duties, DOC inappropriately skipped levels of progressive discipline and imposed disproportionate discipline comparative to other agents disciplined for like conduct. Additionally, Allen argues that a Work Rule #28 violation (Interfering, Misleading, or Obstructing an Investigation) has never resulted in the skipping of levels of progressive discipline.

Allen invokes *Fields v. DOC*, Dec. No. 33874-B (WERC, 7/25/13), for the proposition that if respondent meets the burden of proof as to some but not all of the conduct upon which a disciplinary action is based it is appropriate to lessen the discipline imposed. Allen misreads *Fields*. While it may be appropriate to reduce the level of discipline where the same allegations are not proven, ultimately the issue is what discipline is appropriate for the misconduct that is proven. DOC has met its burden of proof in the most substantive charges. Failure of DOC to meet the fraternization burden is not sufficient to lessen the discipline imposed.

As to Allen's contention of disproportionate discipline, we do consider comparisons between employees in the same classification that involve the same misconduct occurring under similar circumstances. *Morris v. DOC*, Dec. No. 35682A (WERC, 7/15/15).

In this case, none of the purportedly comparable situations provided by Allen can be construed as being sufficiently similar due to the lack of specificity in the evidence offered. Allen submitted 55 separate disciplinary documents into the record, each lacking in enough



specificity to adequately draw the necessary comparison directly to the actions and discipline of Allen. Allen failed to present evidence of disproportionate discipline being administered for the same or similar misconduct.

Allen points to her most recent positive work evaluation, the difficulty in handling a caseload comprised of mental health cases and her length of service as factors that should have been used to mitigate the discipline to something less than discharge. We disagree. The infractions committed by Allen are sufficient to establish just cause for discharge even for an employee with Allen's seniority and work record.

## **VI. SUMMARY.**

Allen failed to properly supervise her parolee, to document incidents of importance, and to communicate with her supervisor. Most importantly, Allen disregarded a mandatory directive for taking a parolee into custody creating a risk to the safety of the public. When given an opportunity to explain her actions, Allen created further harm to her employment by giving deliberately false and at times contradicting statements regarding her actions. Additionally, Allen failed to establish disproportionate discipline amongst similarly-situated employees in this context. Therefore, DOC had just cause to discharge Allen from her employment.

Signed at the City of Madison, Wisconsin, this 28th day of December 2015.

## WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner