STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | OUTAGAMIE COUNTY

GAIL ALLEN,

Petitioner,

vs.

Case No. 16 CV 75
[re: WERC Dec. No. 34110AC1]

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, and DEPARTMENT OF CORRECTIONS,

Respondents.

DECISION & ORDER

I.

Gail Allen (Allen) seeks judicial review of the Wisconsin Employment Relations Commission's (WERC) decision finding her employment with the Department of Corrections (DOC) was not wrongfully terminated. Allen worked as a probation and parole agent for DOC. Following a series of incidents where Allen failed to follow DOC procedures in the supervision of a probationer, Chad Osterero (CO), DOC terminated Allen's employment. A proposed decision upholding Allen's termination was issued on April 13, 2015, and Allen sought review by WERC. In its Decision of December 28, 2015, WERC affirmed finding that DOC had "just cause" under Wis. Stat. § 230.44(1)(a) to terminate Allen's employment. Allen argues that (1) WERC did not follow proper procedures, (2) its decision is not supported by the factual record, and (3) termination is inconsistent with DOC's Progressive Discipline Policy.

II.

Allen was employed as a probation and parole agent with DOC from July 2003 until her discharge on March 15, 2013. Allen's employment record with DOC was very good. (Pet'r's Br.

2, Jun. 10, 2016.) Her discharge arose out of her supervision of CO. CO was convicted of false imprisonment and sexual assault. He was also registered as a sex offender.

The first incident with CO arose on April 12, 2012, when a police officer contacted Allen to report that a woman had accused CO of sexual assault. The officer told Allen that she did not believe that the individual was credible, but that the victim stated she would be seeking a restraining order against CO. (Pet'r's Br. 8; Resp't's Br. 3, Jul. 18, 2016.) Allen took no action to investigate the allegations, did not take CO into custody, discuss the allegations with her supervisor, and did not make a report of the allegation in the COMPAS notes for CO. DOC later attempted to revoke CO's probation over these allegations, but that effort was denied due to the lack of credible evidence that any assault actually took place. (Pet'r's Br. 9.)

The second incident with CO involved a report that CO was sending threatening text messages to a neighbor. The text messages were ostensibly about mail still being delivered to CO's address for the recipient's boyfriend, but they mentioned that CO could see the recipient from his window and knew what kind of vehicle she drove. The recipient reported the text messages because she felt she was being stalked by CO. (Resp't's Br. 4, n. 4.) Despite evidence that Allen received messages from the recipient and attempted to return those calls, Allen never made contact with the alleged victim, never reported CO's alleged conduct or made COMPAS notes about it. DOC learned of CO's alleged conduct when the recipient contacted Allen's supervisor, Ryan Peterson (Peterson). (Resp't's Br. 4.) When questioned about these allegations, Allen initially reported that she knew nothing about them, and later stated that the recipient said the messages were not threatening and just to tell CO to leave her alone. (Pet'r's Br. 10-11; Resp't's Br. 4, n. 4.)

DOC required that probationers accused of crimes be taken into custody pending an investigation into the allegations. This custody policy was mandatory. Agents are also required to report allegations with their supervisors and keep up-to-date COMPAS notes on the probationers under their supervision. Allen did not follow DOC's mandatory custody policy, and did not report the sexual assault or threat allegations in CO's COMPAS notes or discuss the allegations with her supervisor.

Following CO's arrest on the basis of the text messages, Peterson interviewed CO. CO admitted to sending the text messages and stated that he possessed several items that would be considered violations of his supervision with Allen's permission. (Resp't's Br. 6.) These items included sexual materials and weapons. DOC policy requires agents who see pornography in the home of a sex offender to seize the pornography and report the items to the agent's supervisor. (Resp't's Br. 5.) A later search of CO's home by Peterson revealed that CO owned axes, knives, swords, chains attached to balls with spikes, a mace, a mini bat, ropes, whips, a mouth gag, handcuffs, a cane, a blowgun, an empty shotgun shell, gas masks, corkscrews, rubber body parts, Halloween costumes hung ornamentally, fake skeleton heads, paint guns, in addition to the pornography, sex toys, and other erotica. (Resp't's Br. 5.)

Allen maintains that she did not know about most of the items because she was not allowed anywhere other than CO's living room during home visits. (Pet'r's Br. 26.) Those items that she had seen, she dismissed as part of CO's pagan religious beliefs or artistic interests. (Pet'r's Br. 5.) However, DOC's investigation into Allen's conduct revealed that other DOC staff and staff from Opening Avenues to Reentry Success (OARS) had seen some of these items, including sexual items, and brought them to Allen's attention. One member of the OARS team described CO's apartment as a very scary place and said she felt threatened by the axes and

swords hanging on the walls. (Resp't's Br. 6-8.) Allen responded that she had approved the items. (Resp't's Br. 8.)

In the termination letter, DOC stated that Allen had violated work rules 2, 4, and 28. Rule 2 deals with compliance with written policies and procedures. Rule 4 addresses negligence in performing assigned duties and the "exercise of good judgment in dealing with employees, juveniles, offenders or the public." (Pet'r's Br. 2.) Rule 28 prohibits "interfering with, misleading or obstructing the [DOC] in the performance of official functions of the department, including investigations and audits." (Pet'r's Br. 2.) Specifically, DOC stated in the termination letter that Allen was being terminated for (1) violating DOC's "no fraternization rule" (2) allowing CO to possess weapons and items constituting violations of his rules of supervision, and (3) interfering with DOC's investigation into Allen's conduct.

DOC has a Progressive Discipline Policy, encompassing six levels of discipline for violations of DOC work rules. (Pet'r's Br. 3.) The levels range from a written reprimand or one-day suspension for a first offense to discharge, usually for a sixth offense. (Pet'r's Br. 3.) The Directive outlining this policy states that DOC can accelerate the level of discipline if multiple work rules or violations are involved. (Pet'r's Br. 3.)

Allen filed a grievance and an appeal to WERC from DOC's decision to terminate her employment. (Resp't's Br. 10.) WERC affirmed Allen's termination, finding that DOC had just cause to dismiss her. WERC found that Allen violated work rules by failing to follow the mandatory custody policy, by failing to document CO's violations of his supervision, by failing to report incidents to her supervisor, and by allowing CO to have contraband. WERC also found that Allen did not provide accurate and complete responses when questioned about her supervision of CO. WERC also rejected Allen's argument that DOC did not follow its

Progressive Discipline Policy by terminating her instead of implementing a lower form of discipline, such as a suspension. WERC found that the disciplinary examples that Allen presented were not "comparable situations" because none of them involved as many violations or incidents of serious misconduct as those at issue in Allen's case.

III.

On administrative review, questions of law are reviewed *de novo*, but deference should be given to the agency's findings of law depending on the agency's mandate, institutional capabilities, and qualifications. *Lopez v. Labor & Indus. Review Comm'n*, 2002 WI App 63, ¶ 9, 252 Wis.2d 476. An administrative agency's findings of law should be given "great weight" deference when the agency has gained specialized knowledge and expertise. *Ide v. Labor & Indus. Review Comm'n*, 224 Wis. 2d 159, 166 (1999). To warrant deference of any kind, an agency's interpretation of a statute must be reasonable. *Racine Harley-Davidson, Inc. v. State, Div. of Hearings & Appeals*, 2006 WI 86, ¶ 15, 292 Wis. 2d 549, 563 ("Only reasonable agency interpretations are given any deference.").

The primary issue under review in this case is whether WERC properly found that DOC had "just cause" to discharge Allen. Assessing that determination requires reviewing WERC's application of the Wisconsin Civil Service Law. Because that law, Wis. Stat. § 230.44, is one that WERC was charged by the Legislature to administer and WERC has long-standing experience applying that statute, WERC's interpretation of the law is entitled to great weight deference. *See* Wis. Stat. Ann. §§ 230.44, 230.45 (West 2016); *W. Bend Educ. Ass'n v. Wis. Employment Relations Comm'n*, 121 Wis. 2d 1, 13 (1984). Consequently courts should affirm WERC's conclusions regarding the finding of just cause "if a rational basis exists for them or, to

state the rule in another way, if the agency's view of the law is reasonable even though an alternative view is also reasonable." *Id.* at 13-14.

IV.

Is WERC's Decision Supported by Substantial Evidence?

Courts may set aside or remand a case where the order or award depends on a "material and controverted finding of fact that is not supported by credible or substantial evidence." *Crystal Lake Cheese Factory v. Labor & Indus. Review Comm'n,* 2003 WI 106, ¶ 27, 264 Wis. 2d 200. "Substantial evidence is evidence that is relevant, credible, probative and of quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assocs. v. Labor & Indus. Review Comm'n*, 175 Wis. 2d 537, 544 (Ct. App. 1993). Substantial evidence for purposes of administrative review does not require a finding based on a preponderance of the evidence, but only that reasonable minds could arrive at the same conclusion as the commission. *Holy Name Sch. of Congregation of the Holy Name of Jesus of Kimberly v. Dep't of Indus., Labor & Human Relations*, 109 Wis. 2d 381, 386 (Ct. App. 1982). In determining whether substantial evidence supports a finding, the evidence is to be construed most favorably to the commission's findings. *R.T. Madden, Inc. v. Dep't of Indus., Labor & Human Relations*, 43 Wis. 2d 528, 548 (1969). The reviewing court's task is to search the record to locate evidence which supports the commission's decision, not consider evidence contrary to the decision. *Vande Zande v. Dep't of Indus., Labor & Human Relations*, 70 Wis. 2d 1086, 1097 (1975).

Again, the issue before the Court is whether WERC properly found that DOC had just cause to terminate Allen. "Just cause" in the context of a discharge case refers to conduct "which can reasonably be said to have a tendency to impair [the employee's] performance of the duties of his position or the efficiency of the group with which he works." *State ex rel. Gudlin v. Civil*

Serv. Comm'n of City of W. Allis, 27 Wis. 2d 77, 87 (1965). In addition, to justify termination, the conduct must be "so substantial, oft repeated, flagrant, or serious that [the employee's] retention in service will undermine public confidence in the municipal service." *Id.* In determining whether "cause" for termination exists, "it is necessary for this court to determine the specific requirements of the individual governmental position." *Safransky v. State Pers. Bd.*, 62 Wis.2d 464, 475 (1974). The court explained that "[c]onduct that may not be deleterious to the performance of a specific governmental position—i.e. a Department of Agriculture employee—may be extremely deleterious to the performance of another governmental occupation—i.e. teacher or houseparent in a mental ward." *Id.*

Here, WERC found it was of particular importance for a probation agent to follow the DOC's policies and document her actions. The emphasis is on institutional judgment about the seriousness of a probationer's conduct over the individual agent's judgment. Allen's repeated unilateral decisions about what was appropriate for CO and her failure to document allegations made against CO indicated to DOC that she could not be relied on to exercise proper judgment or to follow DOC policies designed to catch lapses in judgment on the part of an agent. The rule violations alleged would constitute "just cause" if supported by substantial evidence.

Allen claims that WERC's decision is not supported by substantial evidence because it dismissed the rule violations alleged and substituted new allegations for the DOC claims it rejected. In her brief Allen claims that "WERC dismissed the 'no fraternization rule' allegation because the DOC presented 'no evidence of a violation' and it rejected the weapons claims sub silentio because the DOC failed to prove those claims as well." (Pet'r's Br. 3 (citations omitted).) Following this logic, Allen alleges that WERC has added new allegations regarding contraband

that was not noticed in the termination letter. Allen argues that those claims that remain were not sufficiently serious to warrant a discharge. (Pet'r's Br. 3.)

The primary problem with Allen's arguments is that it starts with a faulty premise. Just because WERC decision does not state, "We find Allen Violated Rules 2, 4, and 28" does not mean that it did not find a violation of those rules. WERC's decision is clear that the only allegation it found DOC did not prove was the violation of the fraternization policy.

WERC did not dismiss the weapons allegations sub silentio; WERC and Allen define the scope of the weapons allegation differently. Allen argues that the only weapons that can be considered as part of this discharge action are those specifically mentioned in the termination letter, with the exception of whips, because Allen now claims that she did not know about the whips. Allen argues that the only weapons that can be considered are the "paintball gun, ball and chain, and shrink wrapped body parts," and none of those items are actually "weapons." The Termination Letter, however, stated that Allen allowed CO to have items which "should have represented violations of his supervision." The specific items listed were those that Allen admitted to seeing.[1] Part of the DOC's allegations is that Allen was not truthful about her knowledge of the other items or was negligent in not discovering CO's possession of those items.

WERC used the term "contraband" to describe both the weapons and the pornographic or sexual items in CO's possession that constituted violations of his supervision. Grouping the unauthorized items together in that manner does not diminish WERC's finding that (1) Allen violated DOC policies in allowing CO to have the items she admitted knowing about and (2) she was extremely negligent in not discovering the other items. In addition, Peterson testified that for a sex offender with CO's history, items such as axes, knives, chains attached to balls with spikes,

[1] The Court adds the whips to this list because the termination letter states that Allen admitted to knowledge of the whips.

ropes, whips, gags, and handcuffs should have been considered "weapons." (Resp't's Br. 6.) Thus, there is substantial evidence to find that Allen allowed CO to possess weapons in violation of DOC polices.

Even if the weapons and items constituting violations of CO's supervision are not considered, WERC's finding that DOC had just cause to terminate Allen is supported by Allen's failure on more than one occasion to implement the DOC's mandatory custody policy, investigate accusations made against CO, keep adequate records of those accusations, report the accusations to her supervisor, and her failure to fully cooperate with DOC's investigation into her conduct. Allen faults WERC for focusing on Allen's failures to initiate DOC's mandatory custody policy. Allen argues that WERC inappropriately refers to the complainants in the two instances as "victims" and that taxpayer money was wasted by the pointless implementation of the custody policy when DOC would not be able to meet its burden in revocation proceedings regarding CO's alleged sexual assault of Victim A or threatening of Victim B.

These arguments encompass exactly why DOC had just cause to discharge Allen. Treating the complainants as victims until a DOC investigation showed otherwise was what Allen was supposed to do. She was not to impose her judgment that the sexual assault did not happen or that the text messages were not meant as threats; she was supposed to investigate the allegations (holding CO in custody while she did so), document her actions, and report the allegations to her supervisor. Allen failed to do all of these things more than once. Where Allen's description of the complainants' demeanor differed with Peterson's description, WERC was entitled to find Peterson more credible. *See Amsoil, Inc. v. Labor & Indus. Review Comm'n*, 173 Wis.2d 154, 167-68 (Ct. App. 1992) (holding that agencies should be given deference on determinations of credibility, since the examiner was in the best position to observe a witness's

demeanor). The same is true for accepting CO as more credible than Allen regarding what items she had approved.

Again, these violations support a finding of "just cause" because they are integral to the duties of a probation agent, and the violations represent repeated, serious misconduct. Added to this alarming conduct on the part of an agent supervising a sex offender, is the fact that Allen repeatedly failed to be forthcoming and honest with DOC regarding these events. The phone records presented by DOC demonstrate that Allen repeatedly mislead those inquiring into her conduct about when she was notified of the allegations and what action she took to address those allegations. WERC's decision to uphold Allen's discharge is supported by substantial evidence.

Was WERC's Decision Arbitrary and Capricious?

Allen also argues that WERC's decision was arbitrary and capricious because (1) there is no rational basis that DOC proved the "most substantive charges" of the termination letter, (2) the decision ignores DOC's progressive discipline policy, and (3) WERC failed to state a "rational explanation for discharge." (Pet'r's Br. 16-22.) An agency's decision is not arbitrary and capricious if it represents a proper exercise of discretion. *State ex rel. Von Arx v. Schwarz*, 185 Wis.2d 645, 656 (Ct. App. 1994). "A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical rationale founded upon proper legal standards." *Id.* (internal quotations and citation omitted). The probationer bears the burden of proving that the decision was arbitrary and capricious. *Id.* at 655.

As the Court has already concluded under the substantive-evidence analysis, WERC had more than a rational basis to assert that DOC had proven the allegations of the termination letter. Turning to whether DOC failed to apply its progressive discipline system, the Court finds that Allen has not presented comparable examples and has not proved DOC treated Allen differently

than another accused of identical misconduct. *See Lewis Realty, Inc. v. Wis. Real Estate. Brokers' Bd.*, 6 Wis.2d 99, 125 (1959) (explaining a decision to treat one person differently than another accused of identical conduct to be arbitrary and capricious).

Allen argues that WERC failed to point out any differences between the sample cases she presented and the situation here. Allen is ignoring the one big difference which WERC did articulate: the number of serious violations at issue in this case. The examiner counted at least 14 violations. WERC did not find the level of specificity to be sufficient to make a true comparison, but it did conclude that even with Allen's positive work history, the number of serious violations constituted just cause for a discharge. In the Court's own review of these samples, it finds that none of the sample cases involved as many serious infractions as presented by DOC. DOC also considered Allen's credibility as a probation officer if called to testify in future judicial proceedings as a result of inconsistent and untruthful statements to her supervisor. Under these circumstances, DOC was justified in skipping levels of its Progressive Discipline Policy and terminating Allen, and WERC stated a "rational explanation for discharge."

ORDER

WERC's Decision is AFFIRMED.

Dated this 19th day of September 2016.

BY THE COURT:

The Honorable Nancy J. Krueger

Circuit Court Judge, Branch II