

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HENRY C. NEHMER, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 216
No. 72130
PA(adv)-326

DECISION NO. 34972

Appearances:

Sergeant John Kempfert, c/o Dodge Correctional Institution, 1 West Lincoln Street, Waupun, Wisconsin 53963, for the Appellant.

Michael R. Soehner, Labor Relations Specialist – Chief, Office of State Employment Relations, 101 East Wilson Street, Madison, Wisconsin 53707-7855, for the Respondent.

DECISION AND ORDER

Sergeant Henry C. Nehmer appeals the Department of Corrections' decision to suspend him for one day for purportedly violating the Department of Corrections' Work Rules 1 and 29. Hearing in the matter was held before the Wisconsin Employment Relations Commission hearing examiner Stuart D. Levitan on November 7, 2013. The parties submitted written arguments in support of their respective positions.

On April 8, 2014, Examiner Levitan issued Proposed Findings of Fact, Conclusions of Law and Order concluding that there was just cause for the Appellant's one-day suspension. No objections were filed as to the proposed decision and the matter became ripe for Commission action on May 8, 2014.¹

On the basis of the record evidence and the arguments of the parties, the Commission hereby makes and issues the following

¹Aside from certain editing, the text of this decision is identical to the text of Examiner Levitan's proposed decision. While we may have used different language if we were to write this decision ourselves, we find it unnecessary to do so here.

FINDINGS OF FACT

1. Respondent Wisconsin Department of Corrections (“DOC”) is the agency of the State of Wisconsin responsible, among other activities, for the operation of the State’s adult prisons and correctional centers, including the Dodge Correctional Institution (“DCI”) in New London, Wisconsin.

2. Appellant Henry C. Nehmer is a DOC Correctional Officer II (Sergeant) employed at DCI, assigned to the first shift, 6:00 a.m. to 2:00 p.m.

3. At all times material, Respondent DOC has had properly promulgated work rules establishing that department employees were subject to discipline for insubordination / refusing to carry out an oral directive (Work Rule 1) and for leaving before the scheduled end time (Work Rule 29).

4. On January 29, 2012, the DOC issued Human Resources Policy Number 200.30.401-C-5, applying to all departmental employees, as follows:

An employee may not leave his or her post or work location until the end of their designated work schedule, or until a relief is provided for employees in a relief position, or with authorization of their supervisor.

5. At DCI a culture developed whereby officers in a relief position would leave when their relief reported for duty, whether or not their shift was over. Believing this to be a poor practice and contrary to the published policy, DCI Warden Jim Schwochert, on February 8, 2013, distributed the following memo, answering questions which were frequently being asked about the policy, including the following:

16. I work a post / work location that requires relief; am I able to leave my designated post / work location whenever my relief arrives?

No. If your post requires relief you must remain on post until the designated end time and a relief has assume[d] the post. The relief is not permitted to assume the post until the designated start time.

6. On February 15, 2013, Nehmer’s relief reported several minutes before 2:00 p.m., so Nehmer, consistent with his understanding of policy and practice, undertook to depart. He arrived at the sally port, where commanding officer Captain Michael Thomas was enforcing Warden Jim Schwochert’s policy of requiring officers to remain until the designated end time of their shift, at 1:57 p.m.

7. Thomas directed Nehmer to remain until 2:00 pm.
8. Nehmer heard and acknowledged Thomas' directive, but replied he was allowed to leave per policy and practice and did so.
9. By knowingly disregarding Thomas' oral directive and leaving prior to 2:00 p.m., on February 15, 2013, Nehmer violated DOC Work Rule 1.
10. By leaving prior to 2:00 p.m., Nehmer violated DOC Work Rule 29.
11. Respondent had just cause to discipline Nehmer for violating DOC Work Rules 1 and 29 on February 15, 2013.
12. The one-day suspension which Respondent imposed on Appellant Henry C. Nehmer for violating Work Rules 1 and 29 was not excessive.

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to review this matter pursuant to Sec. 230.44(1)(c), Stats.
2. Respondent Department of Corrections has the burden to establish just cause to suspend Appellant Henry C. Nehmer.
3. Respondent has established by the greater weight of the credible evidence that Appellant Henry C. Nehmer violated Work Rules 1 and 29, as alleged in the suspension letter of March 12, 2013.
4. Respondent had just cause to suspend Appellant Henry C. Nehmer for one day for violating DOC Work Rules 1 and 29.

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

ORDER

Respondent's action to suspend Appellant for one day for violating Work Rules 1 and 29, as set forth in its letter of March 12, 2013 is upheld and this appeal is dismissed.

Dated at Madison, Wisconsin, this 3rd day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

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

BACKGROUND

Sergeant Henry C. Nehmer appeals a one-day suspension which Warden Jim Schwochert imposed on March 12, 2013 for violating DOC Work Rules 1 (relating to insubordination) and 29 (leaving before the scheduled end time).

The material facts are not in sharp dispute. Respondent DOC has promulgated a series of work rules for all DOC employees, the violation of which subjects an employee to discipline up to and including discharge. Among the actions which the work rules prohibit are:

1. Insubordination, disobedience, or refusal to carry out oral or written directives or assignments.

29. Failure to report for work at the scheduled start time or leaving before the scheduled end time.

On January 29, 2012, the DOC issued Human Resources Policy Number 200.30.401-C-5. applying to all departmental employees, as follows:

An employee may not leave his or her post or work location until the end of their designated work schedule, or until a relief is provided for employees in a relief position, or with authorization of their supervisor.

At DCI a culture developed whereby officers in a relief position would leave when their relief reported for duty, whether or not their shift was over. Officers would frequently leave as early as 20 to 25 minutes before their shift formally ended. Many DCI officers carried a copy of the DOC policy with them to cite in support of their “leave upon relief” practice.

DCI Warden James Schwochert considered this to be a poor practice and contrary to the published policy and undertook to change the practice. On February 8, 2013, he distributed the following memo (the “Feb. 8 FAQ”), answering questions which were frequently being asked about the policy, including the following:

- 16. I work a post / work location that requires relief; am I able to leave my designated post / work location whenever my relief arrives?**

No. If your post requires relief you must remain on post until the designated end time and a relief has assume[d] the

post. The relief is not permitted to assume the post until the designated start time.

Schwochert directed commanding officers to keep officers from leaving before the end of their shift. On February 15, 2013, Captain Michael Thomas was standing at the entrance to the sally port / muster room at DCI, checking officers out. Nehmer, whose relief had reported to the post, appeared at the area at 1:57 p.m. preparing to leave. Thomas told him not to leave because it was not yet 2:00 p.m., when the shift ended. Nehmer acknowledged that he heard Thomas, replied that he was free to leave per established policy, and did so.²

Thomas conducted an investigatory interview of Sergeant Nehmer on February 23, 2013, at which time they had the following exchanges:

Q: Did you hear me tell you could not leave because it was not 2:00 o'clock and you could not leave.

A: Yes I did.

Q: What time did you enter the sally port by Control?

A: Whatever time you have sounds correct (1357 changing to 1358).

Q: Did you review an email sent out by Warden Schwochert Friday, February 8, 2013, expectation regarding hours of work?

A: No I did not, I deleted it.

...

Q: Do you have anything to add?

A: 1) Your numbers are off on who was at the Control Center when I left. I recall about 6 persons.

2) I want to refer you to the policy Standard Hours of Work #200.30.401 Page 2 C.5, "Leaving work at the end of the scheduled work hours – An employee may not leave his post or work location until the end of their designated work schedule, or until a relief is provided for

²Thomas' initial write-up incorrectly stated the events occurred on Thursday, February 14, rather than Friday, February 15. This mistake regarding the date does not cause us to question any other aspect of Thomas's report.

employees in a relief position, or with authorization from a supervisor.”

3) I also want to point out Warden Schwochert had a conversation with Sgt. Kempfert – advising that the policy was unenforceable.

4) I feel that – per policy when I have been properly relieved I don’t see how you can hold me. I’ve left other days without a supervisor at the gate. I’ve also left when there has been a 2nd shift supervisor in Control. Supervisors are being inconsistent on the enforcement. I feel that your directing me to wait is a wrongful order.

The matter of officers leaving upon relief continued to concern Schwochert. On May 20, 2013, he sent all personnel the following email:

There continues to be issues with staff leaving their assigned post prior to the end of their scheduled shift, one of the reasons provided has been the lack of a standardized clock.

To remedy the issue, effective May 29, 2013 an announcement will be made at 6:00am, 2:00pm, and 10pm on state radio on all talk groups by central control. The announcement will be:

The time is _____ the shift is clear

Staff scheduled for shifts that end at these times are required to remain on post until the announcement is made, and they are properly relieved.

Staff leaving their assigned post prior to the announcement without supervisor approval may be subject to discipline.

Contact your supervisor if you have questions.

Around that time, five officers were being investigated for leaving when their relief reported, even though it was before the end of their shifts. Schwochert determined that one or more did leave early, but because they had not been directed to stay, as Nehmer was, they were not disciplined. By letters dated May 24, 2013, Schwochert informed the five that no disciplinary action would be taken, but that they would be given “job instruction” about management’s performance expectations.

DISCUSSION

The Commission applies a three-step analysis when reviewing an agency's decision to impose discipline: Did the employee engage in the alleged misconduct? If so, did it warrant some form of discipline? If so, was the discipline excessive? The agency bears the burden of persuasion and must show by a preponderance of credible evidence that it satisfies all steps of the analysis. *See, Del Frate v. DOC*, Dec. No. 30795 (WERC, 2/2004).

The first question is one of fact, the second one of policy, the final of justice.

Respondent has assessed one penalty, a one-day suspension, for Nehmer's two alleged offenses – insubordination / ignoring an oral directive (violating DOC Work Rule 1) and leaving early (violating DOC Work Rule 29). Nehmer maintains he was authorized by policy and practice to leave when he did, and was therefore not insubordinate in ignoring Thomas' invalid directive to remain.

Nehmer readily acknowledged at his investigative interview on February 23, 2013, and has never denied, that he heard and disregarded Thomas' directive to remain. Nehmer has challenged the legitimacy of the directive, but he has never denied that he heard Thomas tell him to remain until the end of shift and that he walked out anyway no later than 1:58 p.m.

Nehmer questions whether Thomas was giving an enforceable order when he told him, "you cannot leave yet because it is not yet 2:00 pm." Analogizing to the specificity of information he asserts inmates have to be provided before they can be disciplined for disobeying a directive, Nehmer asserts he could not be disciplined for insubordination unless Thomas had said, "Sgt. Nehmer the time is not 2:00 pm. I am giving you a direct order not to leave the control sally port or you may face discipline." Thomas' recitation of policy, Nehmer asserts, was "ambiguous and up for interpretation."

We do not agree. Nehmer acknowledges that Thomas began his statement, "You cannot leave yet..." This is not particularly ambiguous or open to interpretation. It was one week after Warden Schwochert had sent the FAQ email reiterating that officers were to remain until the designated end of shift. Nehmer may have legitimately felt the policy Thomas was reciting was flawed and its implementation less than uniform, but he cannot reasonably claim confusion as to Thomas's statement.

The heart of Nehmer's defense on both charges is that the Feb 8 FAQ was invalid because it conflicted with DOC Policy 200.30.401. Nehmer argues it is not insubordination to ignore a wrongful directive and that he didn't leave early because he complied with DOC policy. Appellant really doesn't deny he violated the FAQ, but asserts it violates DOC Policy 200.30.401 and is thus invalid.³

³We note some confusion in the record as to Nehmer's awareness of the Feb 8 FAQ. During his first investigative interview, Nehmer told Thomas he had deleted that email without opening it; however, by arguing that it is invalid, Nehmer acknowledges awareness and understanding of it. Obviously, Nehmer is held to the professional responsibility of reading and observing all work email, most especially from the warden.

Nehmer asserts he was authorized to leave by the terms of DOC Policy 200.30.401, in that his relief was provided for, and that any oral directive to enforce the more restrictive terms of the Feb. 8 FAQ was invalid because the FAQ violated DOC Policy 200.30.01. He would have us excuse his insubordination because Thomas didn't have the authority to give the oral directive based on the FAQ.

Because the discipline is issued for violations of the DOC work rules, we must assume that any inferior policy which conflicts with the policy cannot be enforced under their ambit. So we must interpret the Feb 8 FAQ in light of DOC Policy 200.30.401.

DOC Policy 200.30.401 mandates an officer remain on post "until a relief is provided for...." The FAQ reiterates that "relief is not permitted to assume the post until the designated start time."

Nehmer testified there was a "gentlemen's agreement" regarding flexibility in reporting and checking out, such that the officers themselves determined when relief was effectively provided. However, it is not up to the officers to define how a shift is operated; it is management which has the authority to determine how relief is provided.

Schwochert has determined that the operation of the facility is enhanced by ensuring that relief officers coming on duty not assume their post until the designated start time. He has the authority to administer that schedule and has done so. Accordingly, the Feb. 8 FAQ does not conflict with DOC Policy Standard Hours of Work – 200.30.401. It was a properly promulgated personnel policy which Thomas was authorized to enforce by directing Nehmer to remain within the sally port until 2:00 p.m.

Management has the right to determine that a relief employee not assume a post until the designated start time, effectively preventing relief being provided until the designated end time of the prior shift. So even though the officer serving as Nehmer's relief was physically present prior to the start of the shift, that officer was not cloaked with duty status until 2:00 p.m.; it was only then that Nehmer's relief was provided, only then that he could leave.

Nehmer cites a 2013 determination by a Department of Workforce Development hearing examiner which found that a DOC officer must be considered "on duty," with each shift's compensable time commencing, at the conclusion of the officer's roll call and fitness for duty check, even when this occurs prior to the officer's arrival at the post location where the officer relieves the previous shift, and even if it occurs before the officer's "designated start time." This determination is not necessarily inconsistent with Nehmer's theory that the Feb. 8 FAQ is invalid, but is not entirely on point and certainly does not compel that conclusion.

Thomas gave Nehmer an oral directive to comply with a properly promulgated personnel policy. Thomas' directive did not place Nehmer in danger or require him to commit a wrongful act. Nehmer heard Thomas tell him to stay and he knowingly left anyway. His action constituted willful violation of DOC Work Rule 1.

Having determined that the preponderance of credible evidence establishes that Nehmer violated DOC Work Rules 1 and 29, we now consider whether the discipline imposed – a one-day suspension – was excessive.

Although the disciplinary letter of March 12 attributes the one-day suspension to both violations, Schwochert testified he considered it was mainly for the insubordination. Such allocation is appropriate.

A few months after the incident with Nehmer, Schwochert investigated five other officers for violating the Feb. 8 FAQ by leaving after their relief reported, before the end of their shift. He determined that one or more had indeed done so, but issued letters waiving any discipline. Moreover, Schwochert testified that the reason that none of these five was disciplined was because none of them disregarded a directive to stay.

Nehmer is right to challenge being suspended for violating the Feb. 8 FAQ when Schwochert did not suspend, or even discipline, other officers who may have committed the same offense. In general, an employer cannot impose disparate levels of discipline on similarly situated employees for the same offense. However, while Schwochert testified that one or more of the other officers may have violated the Feb. 8 FAQ, the record does not include the evidence necessary to determine whether those employees and Nehmer were indeed similarly situated and the circumstances of their purported offenses.

But even if waiving discipline in May for the five other officers meant Schwochert could not suspend Nehmer in February for violating the Feb. 8 FAQ, he could still discipline him for ignoring Thomas's directive enforcing the policy reflected therein.

It is a well-established tenet of labor relations that, except in certain exigent circumstances, an employee should "work now, grieve later." An employee need not follow a supervisor's directive to do something dangerous or illegal, but must follow a valid directive, even if the employee disagrees, and challenge the order later. That is especially true of employees in a paramilitary setting such as a prison, where the clearly defined command structure is critical.

The reason is self-evident; stressful, even dangerous, conditions are often present, and everyone needs to know that all subordinate officers will properly and promptly comply with directives or assignments issued by their superior officers.

To be absolved of insubordination, a sergeant who asserts the right to disobey a captain's directive has to demonstrate not only that the directive was unauthorized and wrongful, but that compliance would have caused harm to himself or others. We have already found that, since Schwochert was authorized to issue the Feb. 8 FAQ, he was authorized to direct Thomas to enforce it. We further find that the full extent of harm to Nehmer had he complied with Thomas' directive would have been a two-minute delay in leaving the sally port. The cost to Nehmer of

compliance with Thomas' directive was to wait two minutes to leave; his cost for non-compliance was a one-day suspension.

Although Nehmer did not endanger anyone's safety by disobeying Thomas' directive, his misconduct was serious and it was intentional. Sergeant Nehmer could not simply decide, as he did, that Captain Thomas' order was wrongful and need not be obeyed.

The record indicates that Nehmer was issued a written reprimand in June 2012. Given the recognized principle of progressive discipline, and the employer's legitimate interest in ensuring other employees do not also engage in insubordination, we have concluded that a one-day suspension for Nehmer's violation of DOC Work Rule 1 is not excessive.

Accordingly, we affirm the discipline and dismiss the appeal.

Dated at Madison, Wisconsin, this 3rd day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner