

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TROY PFLUM, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 263
No. 73185
PA(adv)-408

DECISION NO. 35067-B

Appearances:

Anthony Gunderson, Representative, Wisconsin Association of Correctional Law Enforcement, 1105 South Watertown Street, Waupun, Wisconsin 53963, appearing on behalf of Troy Pflum.

Laura Amundson, Department of Administration, Division of Personnel Management, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of State of Wisconsin Department of Corrections.

DECISION AND ORDER

On May 8, 2014, Troy Pflum filed an appeal with the Wisconsin Employment Relations Commission pursuant to § 230.44(1)(c), Stats., asserting that he had been discharged without just cause by the State of Wisconsin Department of Corrections. On July 22, 2014, the Commission issued a decision denying a motion to dismiss the appeal. The matter was then assigned to Examiner Stuart D. Levitan and, thereafter, several unopposed requests for the postponement of scheduled hearing dates were granted. Ultimately, given Examiner Levitan's impending retirement, the appeal was reassigned to Examiner Peter G. Davis who conducted a hearing on April 16, 2015, in Madison, Wisconsin. The parties thereafter filed written argument by June 2, 2015.

On June 17, 2015, Examiner Davis issued a proposed decision affirming the discharge. No objections to the proposed decision were filed and the matter became ripe for Commission action on July 17, 2015.

Based on a review of the evidence and argument, the Commission issues the following:

FINDINGS OF FACT

1. The Department of Corrections is a State of Wisconsin administrative agency which operates prisons and correctional facilities.

2. At the time of his discharge on December 13, 2013, Troy Pflum had permanent status in class and was employed by DOC as a Sergeant at the Kettle Moraine Correctional Institution.

3. Pflum had personal contact with a former female inmate who was on extended supervision. Pflum did not file a fraternization policy exemption request or inform his supervisors of the contact and thereby violated DOC policies.

4. Over a period of a few years, Pflum brought his personal cell phone into various correctional facilities on multiple occasions in violation of DOC policies.

5. While at work in various correctional facilities, Pflum accessed websites in violation of DOC policies.

Based upon the above and foregoing Findings of Fact, the Commission 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. By his conduct described in Findings of Fact 3, 4 and 5, Pflum violated the State of Wisconsin Department of Corrections' fraternization, cell phone and internet use policies, respectively.

3. Based on Pflum's violations of the policies referenced in Conclusion of Law 1, the State of Wisconsin Department of Corrections had just cause within the meaning of § 230.34(1)(a), Stats., to discharge Pflum.

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

ORDER

The discharge of Troy Pflum is affirmed.

Signed at the City of Madison, Wisconsin, this 29th day of July 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

**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.

Pflum 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 Pflum's discharge.

For the purposes of his appeal, Pflum agrees that he committed the violations of the DOC policies described in the discharge letter dated December 13, 2013, and summarized in Proposed Findings of Fact 3, 4 and 5. He also concedes that the State had just cause to impose significant discipline but argues that his discharge was too severe a penalty for his misconduct – primarily because of lesser discipline received by other employees for violations of the fraternization policy. Pflum also argues that his candid admission of the cell phone and internet policy violations in the course of the fraternization investigation should work in his favor.

DOC correctly concedes that there are “just cause” implications if it imposes significantly different discipline on similarly situated employees who have engaged in the same misconduct. However, where it is alleged that such disparate discipline has been imposed, the devil is in the details. Are the employees of similar rank, length of service and overall work record? Is the misconduct factually similar? Has the State presented a legitimate basis for imposing significantly different discipline upon seemingly similar employees who have engaged in the same misconduct?

Here, while the investigation into Pflum’s misconduct began with a focus on his violation of the fraternization policy, it ultimately produced his admission of violations of the cell phone and internet policies as well.¹ Thus, although Pflum focuses his disparate treatment arguments on evidence that other employees received lesser discipline for violations of the DOC fraternization policy,² he has not presented any evidence of disparate treatment received by other employees who were disciplined for combined violations of the fraternization, cell phone and internet policies. Therefore, because no factually similar instances of misconduct have been presented, we reject Pflum’s disparate treatment argument.

Pflum points out that unlike some other fraternization discipline scenarios in the record, his contact with the female under DOC supervision did not create any immediate security issues. However, as we have previously held, “... the purpose of the policy is to avoid employees placing themselves in situations where they may seek to influence the manner in which individuals under DOC supervision are treated.” *White v DOC*, Dec. No. 34947-A (10/14). Particularly, if Pflum had developed a long-term, unreported relationship with the female (who ultimately was incarcerated again), the potential for trouble is apparent.

Pflum is also somewhat dismissive of the significance of the cell phone and internet policy violations. However, violations of the cell phone policy in particular have potentially significant implications for the security of a correctional facility. As noted in the Proposed Finding of Fact 4, Pflum violated the cell phone policy multiple times.

Having considered the scope and seriousness of Pflum’s misconduct as discussed above, we conclude that the State did have just cause to discharge him.

¹ Contrary to Pflum’s argument, his admission of cell phone and internet policy violations does not lessen the severity of that misconduct but rather spared him from the additional misconduct he would have committed if he had been less than truthful during the investigation.

² It should be noted that the State presented multiple instances in which DOC employees have been discharged for violations of the fraternization policy.

Signed at the City of Madison, Wisconsin, this 29th day of July 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner