

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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TIM BENIKE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0003

Case Type: PA

DECISION NO. 35078-A

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**Appearances:**

Sean Daley, Field Representative, AFSCME Council 24, P.O. Box 19, Ashippun, Wisconsin, appearing on behalf of Tim Benike.

Amesia N. Xiong, Attorney, Department of Administration, Office of the Secretary, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of State of Wisconsin Department of Corrections.

**DECISION AND ORDER**

On August 4, 2014, Tim Benike filed an appeal with the Wisconsin Employment Relations Commission pursuant to § 230.44(1)(c), Stats., asserting that he had been suspended for one day without just cause by the State of Wisconsin, Department of Corrections. The appeal was assigned to Examiner Stuart D. Levitan who conducted a hearing on December 9, 2014 in Sheboygan, Wisconsin. The parties thereafter filed written argument by March 13, 2015.

Due to Examiner Levitan's retirement, the appeal was then reassigned to Examiner Peter G. Davis who consulted with Examiner Levitan as to the demeanor of the witnesses before issuing a proposed decision.

On July 14, 2015, Examiner Davis issued a proposed decision upholding the suspension. Benike filed objections to the proposed decision on August 7, 2015, and the State responded on August 10, 2015.

Based on a review of the evidence and argument, the Commission makes and 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 suspension on July 17, 2014, Tim Benike had permanent status in class and was employed by DOC as a Correctional Officer at Kettle Moraine Correctional Institution (“KMCI”).

3. On February 25, 2014, Benike was directed to remain at KMCI until a scheduling issue was resolved but nonetheless left KMCI.

Based upon 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 over this appeal pursuant to § 230.44(1)(c), Stats.

2. By virtue of the conduct described in Finding of Fact 3, the State of Wisconsin Department of Corrections had just cause within the meaning of § 230.34(1)(a), Stats., to suspend Tim Benike for one day.

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

**ORDER**

The suspension of Tim Benike is affirmed.

Signed at the City of Madison, Wisconsin, this 14th day of September 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.

Tim Benike had permanent status in class at the time of his suspension and his appeal alleges that the suspension 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."

Here, the State has met its burden of proof as to Benike's suspension.

**I. WAS BENIKE GUILTY OF MISCONDUCT?**

It is undisputed that, on February 25, 2014, Benike agreed to assume a gatehouse officer position at KMCI. Shortly after he agreed to do so, Benike heard from a coworker that it was likely his services would no longer be needed because another employee was going be assigned to that position. Benike then called and spoke telephonically to supervisor Hoffman who confirmed that Benike's services were no longer needed.

What is disputed is whether Hoffman also told Benike to remain at KMCI until the scheduling issue was fully resolved. Hoffman testified that he did so advise Benike (and his testimony is corroborated by Supervisor Hall who could hear Hoffman's end of the conversation), while Benike testified that he does not recall Hoffman's directive. As a general matter where, as here, there is affirmative testimony that a statement was made in contrast to "I don't recall" testimony, the affirmative testimony will be credited unless there are external considerations (i.e. witness demeanor, statement is inherently unlikely to have been made,

statement may not have been heard, etc.) that warrant discounting the testimony. Here, there are no such external considerations<sup>1</sup> and we credit Hoffman's testimony.

By failing to follow Hoffman's supervisory directive (which was neither illegal nor created a safety issue for Benike), Benike was guilty of misconduct.

**II. DID BENIKE'S MISCONDUCT CONSTITUTE JUST CAUSE FOR A ONE-DAY SUSPENSION?**

Failing to follow a supervisory directive is significant misconduct. Particularly, in the context of the written reprimand Benike had previously received, the State had just cause to impose a one-day suspension.<sup>2</sup> We note that the conduct and suspension are quite similar to that which we upheld in *Nehmer v DOC*, Dec. No. 34972 (WERC, 6/14).

Signed at the City of Madison, Wisconsin, this 14th day of September 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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<sup>1</sup> Because the directive occurred during a telephone conversation, there is no persuasive basis for concluding that Benike could not hear same.

<sup>2</sup> Because this portion of Benike's conduct is sufficient to establish just cause for the one-day suspension, we need not and do not make any determinations as to whether Benike engaged in other alleged misconduct. As a consequence, we also need not and do not respond to Benike's claims of disparate treatment/failure to investigate that relate to the other alleged misconduct.