

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JULIO de LIMA SILVA, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0056

Case Type: PA

DECISION NO. 35747-A

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**Appearance:**

Peter M. Reinhardt, Bakke Norman, S.C., 2919 Schneider Avenue SE, P.O. Box 280, Menomonie, Wisconsin, appearing on behalf of Julio De Lima Silva.

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

**DECISION AND ORDER**

This is an appeal by Appellant Julio De Lima Silva from the decision by Respondent State of Wisconsin, Department of Corrections to terminate his employment. The matter was heard on August 12 and 13, 2015, before James R. Scott who was acting as an examiner with final authority pursuant to an order of the Wisconsin Employment Relations Commission entered on July 1, 2015. The parties filed post-hearing briefs which were received by December 1, 2015.

Being fully advised in the premises, the Commission makes and issues the following:

**FINDINGS OF FACT**

1. Appellant Julio De Lima Silva was employed by the State of Wisconsin, Department of Corrections for approximately two years and held the rank of correctional sergeant at the time of his discharge on December 22, 2014.

2. Respondent Department of Corrections (“DOC”) is an agency of the State of Wisconsin responsible for the operation of adult correctional facilities, including the St. Croix Correctional Center located in New Richmond, Wisconsin.

3. De Lima Silva worked at the St. Croix Correctional Center, a minimum security facility that ran a military style boot camp program identified as the Challenge Incarceration Program.

4. De Lima Silva was placed on suspension shortly after an incident with inmate Fernando Haro which occurred on June 23, 2014.

5. Haro refused to comply with a reasonable order from De Lima Silva at which point he was taken to the floor by the use of reasonable force.

6. De Lima Silva reasonably believed that he was at risk of physical attack by Haro and was warranted in taking the action he did which did not result in injury to Haro.

7. The conduct of De Lima Silva on June 23, 2014 did not violate the work rules of the DOC.

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 did not have just cause within the meaning of § 230.34(1)(a), Stats., to discharge Julio De Lima Silva.

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

### **ORDER**

1. The State of Wisconsin, Department of Corrections shall reinstate Julio De Lima Silva to the position he formerly held without loss of seniority.

2. The State of Wisconsin, Department of Corrections shall pay to Julio De Lima Silva all lost wages and benefits less any interim earnings.

Signed at the City of Madison, Wisconsin, this 9th day of March 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

In the early morning hours of June 23, 2014, Julio De Lima Silva, a correctional sergeant at the St. Croix Correctional Center in New Richmond, Wisconsin, was involved in a confrontation with inmate Fernando Haro. Six months later De Lima Silva was discharged from his employment based upon his actions during that incident.

Most of the facts are not in dispute and the incident was captured on videotape. The focus of the dispute is on the interpretation and application of a complex set of rules governing the relationship between guards and inmates in the Wisconsin prison system. That turns a factually simple matter into a complex decision as to whether just cause existed for the discharge of Julio De Lima Silva.

**The Incident.**

The St. Croix Correctional Center is a minimum security prison which operates a Challenge Incarceration Program. Inmates participate in a military-style boot camp atmosphere. De Lima Silva had worked for two years for the DOC and had no record of prior discipline. He had been promoted to the rank of sergeant. The Center housed inmates in a military-style barracks with approximately 40 inmates to a barracks.

On the morning of June 23, 2014, De Lima Silva was at the tail end of a 16 hour double shift. He was in charge of the upper barracks and Sergeant Paul Fulton was in charge of the West lower barracks. Each had about 40 inmates they were supervising. The barracks consists of a long room full of side-by-side metal bunk beds with the guards' room or "bubble" at one end and the bathroom at the other end.

De Lima Silva entered Sergeant Fulton's barracks in the middle of a loud argument between Fulton and Haro. Fulton had informed Haro that he could not sleep with his head covered and had woken him up in the process. It happened a second time and Haro was shouting obscenities at Fulton. De Lima Silva assisted Fulton in settling Haro down and the two officers went to the control area. The incident with Haro woke up other inmates in the unit, some of whom were standing at attention next to their bunks. That signaled that they were seeking permission to use the bathroom. The procedure in place for obtaining permission was that an inmate stood at attention and the sergeant would grant permission either orally or by blinking a flashlight directed at the inmate.

While this was going on, Haro got out of his bunk and strolled down the room heading toward the bathroom. This was clearly contrary to the procedure. Fulton and De Lima Silva agreed that De Lima Silva should proceed to the bathroom area and address the issue.

### The Confrontation.

De Lima Silva walked to the bathroom area where Haro was standing. Again the protocol required that he stand at attention but he was not at attention. He was told three times by De Lima Silva to return to his bunk. The direction was given in an increasingly louder tone and De Lima Silva pointed towards the bunk. Haro did not comply. De Lima Silva approached from behind in the “2½ position.” Haro directed a “target glance” at De Lima Silva and then stated “go fuck yourself, you son of bitch.” Haro then clenched his fists and raised them slightly above his waist. De Lima Silva then applied a wrist lock to Haro’s wrist area and spun him to the ground. De Lima Silva yelled “stop resisting, stop resisting” at Haro as he kneeled next to Haro. Haro did stop physically resisting but called De Lima Silva a “girl” and said it was “bullshit.” After several minutes and the arrival of Fulton, Haro got to his feet and De Lima Silva escorted him to an interview room. Haro was asked by De Lima Silva and others whether he was hurt and he responded that he was not.

According to De Lima Silva, he perceived that Haro was about to swing at him in a dark room and in close proximity to other inmates. He made an instantaneous decision to “destabilize” Haro because of that fear. We have Haro’s version, as well as De Lima Silva’s and the video. The video is at best inconclusive as to whether the raising of Haro’s arms signaled an attempt to initiate a fight or whether the “target glance” occurred.

### Haro’s Version.

Haro readily acknowledges that he had two verbal confrontations with Fulton earlier in the evening during which he used strong language directed at Fulton.<sup>1</sup> According to Haro, he left his bunk to use the bathroom after obtaining the required flashlight signal. He claims he did not hear De Lima Silva’s commands to return to his bunk. In Haro’s version, he was standing at attention waiting to proceed into the bathroom when De Lima Silva grabbed him and spun him to the floor. De Lima Silva placed his knee in Haro’s back, causing an injury, and placed his forearm on Haro’s neck. Haro says he did not say “go fuck yourself, you son of bitch” and that he only used the term “ma’am” directed at De Lima Silva when he was advised that De Lima Silva would lift him to his feet.

I find Haro to be lacking in credibility. He is not an unbiased witness as he was under DOC supervision. More importantly, while testifying at the hearing that he was injured by De Lima Silva at the time of the event, he told De Lima Silva and Captain Scott Grady he was not hurt. Two months later he told Superintendent Maria Silao that he was not injured in the incident.

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<sup>1</sup> Haro told Fulton “fuck you, why the fuck are you bugging me” when he was warned a second time about covering his head. He also told Fulton he was not supposed to be in the Challenge Incarceration Program and wanted to go back to regular prison.

Haro also claimed he obtained permission to use the bathroom yet the video clearly shows he got up and strolled directly to the bathroom without standing at attention with his heels together while awaiting his turn at the bathroom.

As noted above, Haro had already had a confrontation with the guards over the pillow issue shortly before the bathroom incident.

Certainly Haro's behavior with Fulton demonstrated someone bent on non-compliance and he likely would not have hesitated to use the same confrontational approach with De Lima Silva.

#### Work Rule Violations.

De Lima Silva was discharged because of the alleged violation of three work rules:

- Work Rule #2: Failure to comply with written policies and procedures including but not limited to Executive Directives and Administrative Directives;
- Work Rule #6: Falsification of records, knowingly giving false information or knowingly permitting, encouraging or directing others to do so. Failing to provide truthful, accurate and complete information when required;
- Work Rule #11: Threatening, attempting or inflicting bodily harm on another employee, inmate, juvenile, offender or the public.

The purported violation of Work Rule #11 – causing bodily injury is rejected. As noted, Haro's purported "injury" is not supported by the record and is contrary to statements he made in his interview with Silao. Similarly, the claim of falsification is rejected. This purported violation is based upon the conclusion that De Lima Silva's version of events is directly contradicted by the video. In fact, the video is not conclusive as to what Haro was doing immediately before the "destabilization." In order to prove that an employee intentionally violated the requirement more proof than simply a difference in interpretation of a video is necessary.

The gist of this matter and the basis for discipline if any is warranted is Work Rule #2 which is a catchall "failure to comply" with written policies and procedures.

Violation of Work Rule #2.

Specifically, DOC argues that De Lima Silva violated the use of force policy #306.07.01<sup>2</sup> and the principles of subject control (POSC) policy. The use of force policy provides that non-deadly force (which is what was used) may only be used by a staff member if the:

[U]ser of force reasonably believes it is immediately necessary to realize one of the following purposes:

- A. To prevent death or bodily injury to oneself or another.
- B. To prevent unlawful damage to property.
- C. To regain control of an institution or part of an institution.
- D. To prevent the escape of an inmate.
- E. To apprehend an inmate who has escaped.
- F. To change the location of an inmate.
- G. To control a disruptive inmate.
- H. To enforce a DOC rule, a posted policy or procedure or an order of staff member.

If the Haro version of events is rejected, as it has been, then subsection H would likely be applicable. De Lima Silva was using non-deadly force to enforce his order that Haro return to his bunk. The inquiry does not however end at that point. The policy also requires that the staff member believes that the use of force is “immediately necessary.” Additionally, the POSC policy requires generally that DOC minimize situations where force is required and minimize the amount of force used. The POSC policy and training guide in its entirety is 135 pages long and clearly requires the exercise of judgment based on a wide variety of circumstances. There is no question that DOC needs to regulate the use of force in its institutions. The policy of the DOC is designed to minimize the use of force and is perfectly understandable. On the other hand, correctional officers are supervising convicted felons, many of whom have committed serious acts of violence.

In order to sustain the discipline imposed on De Lima Silva, the state must prove a violation of Work Rule #2 which requires proof that De Lima Silva violated the use of force policy. I conclude that they have failed to meet that burden.

DOC presented expert testimony from Jason Achtenberg, Director of Security at the Stanley Correctional Institution. Achtenberg conducted a “use of force review” of the De Lima Silva incident and concluded that the use of force was not warranted and, therefore, DOC concluded that De Lima Silva violated policy and should be discharged.

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<sup>2</sup> The use of force policy is codified as Wis. Admin. Code § DOC 306.07(2).

Achtenberg concluded that Haro was not in a “pre-attack posture” and therefore non-deadly force was not warranted. He acknowledged that if Haro was in a pre-attack posture the conduct of De Lima Silva would have been appropriate.

Q. If the inmate, Fernando Haro, was in a pre-attack posture, given the totality of the circumstances including the inmate glancing over his shoulder and using profanity in response to commands, do you believe decentralization would have been a reasonable use of force?

A. Yeah.

Tr.169.

That leads us to examine the basis for Achtenberg’s conclusion that Haro was not in a pre-attack posture. He acknowledges that Haro did glance back over his shoulder in what could be a “target glance” and that Haro’s arms were “slightly bent” which, in Achtenberg’s judgment, was not “exaggerated enough for one to determine 100 percent what his intent was.” Achtenberg goes on to speculate that Haro’s action could have been “nervous movement.” Achtenberg’s conclusions are based upon his interview with De Lima Silva and his review of the video. After reviewing that same video numerous times, I conclude that Achtenberg’s view is speculative. To Achtenberg’s credit, he was very open about his speculation and he acknowledged that De Lima Silva had to make an instantaneous decision in poor lighting. He agreed correctional officers placed in that situation should be “cut more slack.” Clearly, De Lima Silva did not receive the benefit of the doubt.

#### The Handcuff Question.

A curious side issue is the view of several witnesses for DOC that had De Lima Silva placed Haro in handcuffs after the destabilization it would have justified the initial destabilization or that the failure to place Haro in handcuffs was evidence of the fact that De Lima Silva did not face an immediate threat of harm. This, in spite of the fact that the video clearly shows that Haro had “settled down” after the takedown and was walked off the premises with no resistance.

David Hicks, the employment relations specialist responsible for addressing consistency in discipline and himself a former correctional officer, concluded that if De Lima Silva had placed Haro in handcuffs after the takedown the use of force would have been “100% justified.” Warden Quala Champagne, the ultimate decision maker, concluded that the failure to use handcuffs was outside the normal “protocol” and constituted evidence that use of force was unnecessary.

In sharp contrast, Grady (De Lima Silva’s supervisor) and Superintendent Joann Skalski testified that use of handcuffs after a destabilization was up to the discretion of the correctional



officer. This difference in opinion amongst management representatives underscores the complexity of analyzing the use of force in a situation like this. An error in judgment and interpretation of a complex set of policies as occurred here does not create just cause for discharge.

### Comparability.

One factor in determining “just cause” is the requirement that the employer treat similarly situated coworkers alike in terms of discipline. This is particularly true in discharge cases. *Morris v. DOC*, Dec. No. 35682-A (WERC, 07/2015). DOC itself has adopted a policy of comparability in discipline system wide. Here, there was evidence that another sergeant at the St. Croix Correctional Center received a one-day suspension for an excessive use of non-deadly force. The incident occurred one month before the De Lima Silva incident. The officer, Terry Korte, pushed an inmate into a wall and grabbed his head between his hands.

Champagne’s explanation of the difference in treatment between the two is less than convincing. The basis for differential treatment was not the fact that Korte was less violent in his actions but rather that he reported the incident more rapidly. De Lima Silva waited fifteen minutes until his supervisor arrived at work at 5:30 a.m. rather than calling him immediately after the incident. Champagne found that delay significant. She also faulted the fact that Haro was not taken to see a nurse immediately even though he reported no injury. In her mind, this justified the differential in discipline.<sup>3</sup>

An additional concern was the review conducted by Hicks, the employment relations person responsible for consistent treatment. He readily acknowledged that he found incidents where staff had used excessive force but were not terminated. No evidence was presented concerning the particulars and I must therefore conclude that DOC’s application of its rules and policies has been inconsistent.

Finally, I must note that the delay of six months between the incident and the discharge is troubling. While thoroughness in investigations is commendable, this is a factually simple matter that could have been resolved in less than six months. When an employee has been on paid leave for a long period of time, there is a natural tendency to conclude that discharge is warranted in order to avoid criticism of the delay.

### Conclusion.

I find there is no credible evidence to support violations of Work Rules #11 (causing bodily injury) and #6 (falsification). As to Work Rule #2, which is basically the alleged violation of the use of force policy and the POSC guidelines, I conclude there is insufficient evidence of a

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<sup>3</sup> These were the only two “use of force” incidents Champagne dealt with in her five years as head of fourteen institutions.

violation. Additionally, it is apparent that the application of discipline in similar situations has been inconsistent. Accordingly, DOC has failed to establish just cause for discharge.

Signed at the City of Madison, Wisconsin, this 9th day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman