

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TIM BENIKE, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0010

Case Type: PA

DECISION NO. 35765

Appearances:

Mr. Sean Daley, Field Representative, AFSCME Council 32, 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 September 16, 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 five days 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 and 12, 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. Examiner Levitan indicated that the demeanor of the witnesses did not impact his view of the credibility of their testimony.

On July 28, 2015, Examiner Davis issued a proposed decision modifying the five-day suspension to a three-day suspension. On August 20, 2015, Benike filed objections to the proposed decision, and the State responded on August 24, 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 (“DOC”) is a State of Wisconsin administrative agency which operates prisons and correctional facilities.

2. At the time of his suspension on July 14, 2014, Tim Benike had permanent status in class and was employed by DOC as a correctional officer at the Kettle Moraine Correctional Institution (“KMCI”).

3. On March 3, 2014, Benike and Correctional Officer Doying transported inmates to and back from the University of Wisconsin Hospital in Madison, Wisconsin.

4. Benike and Doying shared the responsibility of insuring that inmates are strip searched before departing the hospital and upon reaching KMCI.

5. During the time that the strip searches would normally have been conducted, Benike was performing other transportation-related duties that took him away from the inmates’ location. Benike assumed that Doying had insured that the strip searches had occurred during his absence.

6. The strip searches did not occur.

7. Benike did not provide false, inaccurate or incomplete information during the investigatory process.

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 6, the State of Wisconsin Department of Corrections had just cause within the meaning of § 230.34(1)(a), Stats., to suspend Tim Benike for three days.

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 modified from five days to three days, and Benike shall be made whole as a result of the modification.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

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 five-day 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 partially met its burden of proof as to Benike's suspension.

I. WAS BENIKE GUILTY OF MISCONDUCT?

It is undisputed that on March 3, 2014, Benike and Doying were responsible for the strip searches of inmates when leaving the hospital and again upon return to KMCI and that the strip searches did not occur at KMCI. The record also clearly establishes that the strip searches did not occur at the hospital. Therefore, it is clear that Benike was guilty of misconduct.

However, the degree of Benike's misconduct as to the strip searches is mitigated by evidence that he plausibly assumed the strip searches had occurred under Doying's supervision while he was away performing other standard (at least prior to March 3) transportation duties. Thus, while Benike did not meet his overall responsibilities as to the strip searches, and unwisely assumed Doying had met hers, his misconduct is less significant than Doying's, who intentionally failed to meet her responsibility.

The State also asserts that Benike engaged in misconduct during the disciplinary investigation when he replied "I assumed they were" in response to a question as to whether

the inmates had been strip searched at the hospital. We conclude this statement was truthful and not false, inaccurate or incomplete. Therefore, we reject this State assertion.

II. DID BENIKE’S MISCONDUCT CONSTITUTE JUST CAUSE FOR A FIVE-DAY SUSPENSION?

Benike had a one-day suspension on his record at the time the State imposed the five-day suspension. The record reflects that the “standard” disciplinary progression would have meant imposition of a three-day suspension, but the State concluded it was appropriate to “jump” to a five-day suspension given the nature of the misconduct. The State also made a jump as to Doying, imposing a one-day suspension rather than a written reprimand due to its view of the severity of the misconduct.

Because we find Benike’s misconduct as to the strip searches to be mitigated and less severe than Doying’s, and because we have rejected the contention of misconduct during the investigatory interview, we conclude that the State did not have just cause to jump the standard disciplinary progression and impose a five-day suspension. However, in light of the one-day suspension previously received,¹ Benike’s misconduct did provide just cause for a three-day suspension.²

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

¹ By our restoration of Benike to a standard disciplinary progression in which the level of discipline is premised in part upon the level of discipline previously received, Benike has received the same level of disciplinary relief that could have been attained if we addressed and found merit to his disparate treatment arguments. Therefore, they will not be addressed.

² As reflected in *Morris v. DOC* (WERC, 7/15), we are generally reluctant to micromanage levels of suspension. However, given the interplay between Benike’s and Doying’s misconduct and the “jump,” this reduction in the level of suspension is appropriate.