

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TIM BENIKE, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0060

Case Type: PA

DECISION NO. 36126

Appearances:

Sean Daley, Field Representative, AFSCME Wisconsin Council 32, P.O. Box 19, Ashippun, Wisconsin, appearing on behalf of Tim Benike.

Amesia Xiong, Attorney, Department of Administration, 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 May 29, 2015, Tim Benike filed a timely appeal with the Wisconsin Employment Relations Commission pursuant to § 230.44(1)(c), Stats., asserting that he had been suspended for ten days without just cause by the State of Wisconsin, Department of Corrections. Hearing was held on October 1, 2015, in Sheboygan, Wisconsin, before Examiner Raleigh Jones. The parties made oral arguments at the conclusion of the hearing.

On November 31, 2015, Examiner Jones issued a proposed decision finding the State of Wisconsin, Department of Corrections lacked just cause for the suspension. The State objected to the proposed decision and briefs relating to the objection were received and exchanged by December 31, 2015.

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

FINDINGS OF FACT

1. The Department of Corrections (“DOC”) is an agency of the State of Wisconsin which operates the State of Wisconsin prisons and correctional facilities. The Kettle Moraine Correctional Institution (“KMCI”) is a medium security facility located in Plymouth, Wisconsin.

2. Tim Benike is employed as a Correctional Officer at KMCI. Benike also is the president of the KMCI AFSCME local union. At the time of the suspension, he had permanent status in class.

3. Sean Daley is a Field Representative for Wisconsin Council 32 of the American Federation of State, County and Municipal Employees, a role which has him visiting employees at KMCI, including Benike, with fairly regular frequency. When Daley is at KMCI, he wears an official DOC identification badge, which was issued to him by DOC in his Field Representative capacity.

4. On November 12, 2014, Benike was assigned to work as the sole guard in Tower 1, which is an elevated observation post located at the entrance of KMCI. Items often are passed up to and down from an officer working in such towers by use of a rope.

5. During Benike’s shift, the KMCI control center routed a telephone call from Daley to Benike in Tower 1. Daley was calling to let Benike know that he would be coming to KMCI that day to deliver subpoenas to several KMCI employees, including Benike, for an upcoming hearing before the Commission.

6. Shortly after receiving Daley’s call, Benike observed Daley on the sidewalk approaching Tower 1. Benike lowered a rope from the tower with a clipboard attached to allow Daley to send the subpoena up. Daley however had difficulty locating the Benike subpoena among his papers, so he told Benike he would return with it later. Then Daley attached two venison sticks in clear packaging to the clipboard, which Benike pulled up into the tower. This exchange took one minute or less.

7. Later, Daley returned to Tower 1 with the subpoena for Benike, at which point Benike again lowered the rope. Daley attached the subpoena to the clipboard, Benike raised it back up into the tower, and Daley left the area. This exchange took one minutes or less.

8. On March 23, 2015, Benike was suspended for ten days for having received the venison sticks and subpoena from Daley at Tower 1. Subsequently, on September 28, 2015, the ten-day suspension was reduced to a five-day suspension, because a prior five-day suspension had been reduced to a three-day suspension.

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 suspend Tim Benike.

Based on 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 rejected. The State of Wisconsin, Department of Corrections shall make him whole for all lost wages and benefits.

Signed at the City of Madison, Wisconsin, this 22nd day of March 2016.

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 suspension, and his appeal alleges that the suspension was not based on just cause.

In such an appeal, the State has the burden of proof to establish that an employee is guilty of misconduct and that 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).

There is no dispute in this case as to what occurred. Benike does not deny that he twice lowered the rope from Tower 1 to Daley, to which Daley attached venison sticks on the first occasion and a subpoena on the second, and Benike raised these items up into the tower. The question for us is whether these actions constituted misconduct such that DOC had just cause to suspend Benike.

The record establishes that the items Benike accepted from Daley are permitted in towers. DOC's position in this case is that the items became unauthorized when Benike accepted them from a non-employee and thereby violated a policy which only allows approved items in towers and requires that unauthorized items be reported to a security supervisor. The record also establishes that tower officers are permitted to divert their attention away from their 360-degree observation of the institution grounds to raise and lower items to and from the tower using a rope. However, DOC claims this action was impermissible because Benike was interacting with a non-employee. Thus, rather than attending to his duties, Benike was neglecting them. The fundamental problem with these positions is that DOC has failed to establish that Benike knew or possibly could have known that he was not permitted to have such an exchange with Daley.

As a basic matter, there is nothing in DOC's work rules, general DOC orders for towers, or KMCI-specific post orders for towers that expressly prohibits tower officers from accepting items from non-employees. This fact is significant given the detailed nature of the DOC and KMCI orders for towers. Although the warden from the Green Bay Correctional Institution testified that such activity is prohibited, he was not able to point to any written policy; and the same was true for the warden of KMCI.

Further, the record suggests a common belief among DOC employees that they are permitted to accept items in towers from non-employees. A witness from Dodge Correctional Institution recounted that there have been eight to ten instances in which he has had a restaurant deliver food directly to the base of a tower. A witness from Green Bay Correctional Institution testified that he has lowered a rope from a tower dozens of times to a non-employee, primarily to receive lunches.

DOC argues that those are different institutions, but the practice apparently occurs at KMCI too. A KMCI officer testified that he has had food delivered by his wife at the base of the tower and has known others who have done the same. He also has indicated to other KMCI officers that he intended to have food delivered in such a manner, and they apparently did not report those plans to a supervisor despite a requirement that all rule violations are to be brought to management's attention.

In the incident that gave rise to the present case, three employees were present in the gatehouse when Daley indicated that he intended to deliver a subpoena directly to Benike at the tower, and two of those employees saw Daley standing at the base of Tower 1 talking to Benike, but they did not report that activity as a violation of any work rule. In an investigatory interview, one of those officers stated that he did not report the activity because he did not believe he had reason to question it. Further, when Benike contacted his supervisor within a couple minutes of having received the subpoena from Daley, he did so because he wanted to know how to handle the hearing, and he apparently had no sense that he might have engaged in some inappropriate conduct. Even more importantly, the record indicates that the supervisor contacted by Benike did not immediately respond to Benike as if he had violated some rule by interacting with Daley at Tower 1. Rather, he simply instructed Benike to provide to him a copy of the subpoena so he could note Benike's absence by attaching it to the work schedule.

DOC asserts the fact that it has not known of prior instances in which items have been accepted from non-employees into towers does not preclude it from taking disciplinary action against Benike. We agree. The significance of management not knowing before about this type of conduct is not that it establishes some sort of pattern from which DOC cannot deviate. Rather, it is that it strongly suggests that the conduct, although observed by employees and at least one supervisor, was never reported to management because it was never understood to be prohibited. We cannot help but wonder if the absence of a policy in this area is what caused DOC to take over four months to investigate and discipline Benike for conduct that he fully admitted to on the day it occurred.

Finally, even if there was an express prohibition at DOC or KMCI against accepting items at towers from non-employees, such a prohibition might not allow for a clear-cut application in this particular case. The record shows that officers at Tower 1 exchange items fairly routinely with non-employees. They give keys to utility workers who visit KMCI and to local law enforcement officials who use the institution's firing range. DOC argues that such interactions are different than Benike's exchanges with Daley because utility employees and local law enforcement officials are formally authorized to be on KMCI grounds. We fail to see how it could have been clear at all to Benike that Daley was not also an "authorized" individual on KMCI grounds. DOC had issued an official state identification badge to Daley, which he was wearing when he approached Benike at Tower 1 on the day at issue. The record indicates that the badge looks like an employee badge. If the badge was not issued specifically to authorize Daley's presence on institution grounds, we cannot fathom what its purpose would have been.

Signed at the City of Madison, Wisconsin, this 22nd day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner