

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KAREN WERY, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0145

Case Type: PA

DECISION NO. 36394

Appearances:

Sean Daley, AFSCME Wisconsin Council 32, P.O. Box 19, Ashippun, Wisconsin, appeared on behalf of Karen Wery.

Michael J. Gentry, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, appeared on behalf of the State of Wisconsin, Department of Corrections.

DECISION AND ORDER

On May 11, 2016, Appellant Karen Wery filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting that she had been suspended for three days without just cause by the State of Wisconsin, Department of Corrections. The Commission assigned the appeal to Examiner Karl R. Hanson who conducted a hearing on July 7, 2016, in Green Bay, Wisconsin. The parties made oral arguments at the conclusion of the hearing.

On August 8, 2016, Examiner Hanson issued a Proposed Decision and Order concluding there was not just cause for the suspension. The State filed objections and the Appellant filed a response. The matter became ripe for Commission action on September 12, 2016

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

FINDINGS OF FACT

1. Karen Wery is employed as a Corrections Sergeant by the State of Wisconsin, Department of Corrections and had permanent status in class at the time she was disciplined.

2. The Department of Corrections is an agency of the State of Wisconsin.

3. On January 1, 2016, Wery returned a small box containing trash to an inmate's cell after he disposed of it in violation of the housing unit's rules and refused to obey Wery's orders.

4. Wery was given a three-day suspension on February 19, 2016, without pay, for failing to exercise good judgment in violation of the Department of Corrections' work rules.

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 discipline Karen Wery with a three-day suspension.

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

ORDER

The appeal is sustained and the three-day suspension is rejected. The State of Wisconsin, Department of Corrections shall make Karen Wery whole for all lost wages and benefits; references to this discipline shall be removed from her personnel file.

Dated in Madison, Wisconsin, on the 26th day of September 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.

Karen Wery had permanent status in class at the time of her suspension and her appeal alleges that the suspension was not based on just cause.

The State has the burden of proof to establish that Wery was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

On January 1, 2016, Karen Wery was on duty at the Green Bay Correctional Institution (“GBCI”) as the lead worker responsible for the security of an inmate housing unit. That afternoon, when inmates requiring medication were called from their cells to receive it, Inmate Gordon left his cell. Gordon brought a small box containing trash down from his cell on the far end of the second tier of cells to a trash can next to Wery’s desk on the first floor.

GBCI’s housing unit rules provide that inmates are only permitted to dispose of trash at a specific time in the morning. Additionally, Gordon was not scheduled to receive medication on January 1, 2016, and should not have left his cell when he did.

GBCI is a maximum security prison in which every aspect of each inmate’s day is regulated. DOC requires that inmates at GBCI adhere to an established routine and housing unit rules, regardless of how mundane or inconsequential. Prior to this incident, Wery issued a conduct report to Gordon for a rules infraction. As a result, Gordon lost certain privileges at GBCI for a short period of time.

When Wery instructed Gordon to retrieve the box of trash and return to his cell, he returned to his cell without the trash. As he left the area of her desk, Gordon profanely told Wery that he would not follow her instructions to retrieve the trash and challenged her to write him a conduct report because he did not care if he received another.

Wery was aware that Gordon's insubordination and her response were viewed by other inmates. Wery did not believe that writing a conduct report would change Gordon's behavior and that she must respond to Gordon's insubordination in order to maintain her authority on the unit.

Wery retrieved the box of trash from the waste can, followed Gordon to his cell, and, after he entered the cell, tossed it onto the floor of the cell, less than a foot inside the door. She instructed him that he could throw the trash away at the designated time in the morning. Wery did not write a conduct report.

She did write an incident report because as she walked away Gordon yelled that the box had hit his cellmate in the face. Wery knew that was not possible, but determined that writing an incident report was wise to document the interaction.

DOC investigated this matter after reviewing the incident report. Wery was disciplined with a three-day suspension after the investigation.¹ Less than two months earlier, Wery received a one-day suspension for loudly yelling at an inmate and thereby violating the same work rule as at issue here which proscribes the exercise of poor judgment by employees.

Warden Eckstein testified that Wery's actions had the potential to needlessly escalate the interaction with Gordon. He emphasized that, in part, he is concerned for her safety when there is a potential for a situation to escalate. Eckstein suggested that instead of taking the box of trash back to Gordon's cell, Wery could have had Gordon brought back down to her station or called for a supervisor. Another DOC witnesses testify also that Wery should have handled the situation differently. When asked how, she also suggested she should have called a supervisor.

Wery and her witnesses testified that calling a supervisor is not a plausible option. They stated that, in their experience, no supervisor would have deemed this incident worthy of a supervisor's response and would have told Wery to handle it as she was in charge of the housing unit. They speculated that Wery would have been looked down on by her superiors if she called for a supervisor to handle such a minor matter. That said, Wery admits that had she the chance to do this over again, she would undertake the same actions, but would also write a conduct report for Gordon.

While there is agreement that Wery should have written a conduct report, the record does not establish that her failure to write a conduct report was a reason for the discipline.² The discipline was imposed not for Wery's failure to write a conduct report, but due to her actions in handling the situation on January 1, 2016.

¹ The original letter of suspension reads that the three-day suspension was issued in part because Wery "threw the garbage hitting [Gordon's] cellmate." When Wery's representative pointed this factual error out to the Warden's staff, that fact was removed from the letter. A revised letter with the same level of punishment was issued the same day. Warden Scott Eckstein testified that when he signed the original letter he knew that the box had not hit Gordon's cellmate but did not catch the error; the level of discipline was intended to reflect the conduct described accurately in the revised letter.

² If the record had established that Wery was required to write a conduct report based on this incident and that she was disciplined for failing to do so, we may conclude that she had committed misconduct worthy of discipline.

Wery's actions on January 1, 2016 do not amount to misconduct. The "failure to exercise good judgment" may include a broad realm of activity. Here, Wery is expected to enforce a system of rigid rules that control every aspect of inmates' lives and maintain her authority. The record does not support a conclusion that Wery was expected to call a supervisor to deal with an inmate for any interaction that is not routine. Wery is expected to exercise a degree of judgment in her position.

Unlike another correctional sergeant recently disciplined for exercising poor judgment, DOC has not offered an obvious alternative for Wery's interaction with Gordon, using what it would define as good judgment. In *Susan Kimball v. DOC*, Dec. No. 36338 (WERC 6/2016), the Commission held that a correctional sergeant failed to exercise good judgment when she diminished an officer's authority and demeaned him in front of members of the public by yelling at him. In that case, DOC demonstrated that the sergeant reasonably could and should have used a phone to give instructions to the officer or called him over to talk privately rather than yelling at him loudly in a public area.

On this record, what DOC calls poor judgment is too subjective in the face of competing expectations (i.e. maintaining adherence to housing unit rules at the lowest level possible) and without a clear alternative (to calling a supervisor to enforce the housing unit rules) to warrant the appellation of misconduct. It is reasonable for the warden to tell Wery to handle a situation such as this one differently. He is ultimately responsible for enforcement of rules within the institution and how his staff performs their duties. We do not necessarily condone Wery's conduct and acknowledge a warden has the right to establish expectations regarding how his staff should interact with inmates. In this circumstance, it simply cannot be said that Wery violated a defined or implied expectation for what constitutes good judgment, however, or that Wery should have known to handle Gordon's rule infraction differently.

If DOC has a preferred way for Wery to handle a situation such as that presented on January 1, 2016, they can surely tell her without emphasizing the point with a three-day suspension.

Dated in Madison, Wisconsin, on the 26th day of September 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner