

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ADAM KRUEGER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0152

Case Type: PA

DECISION NO. 36738

Appearances:

Adam Krueger, N8603 Streblov Drive, Apt. 8, Fond du Lac, Wisconsin, 54937, appearing on his own behalf.

Mark Herman, Attorney, Wisconsin Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, 53707-7864, appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On May 25, 2016, Adam Krueger filed a timely appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting he had been suspended for five days without just cause by the State of Wisconsin Department of Corrections. The Commission assigned Danielle L. Carne to serve as hearing examiner. Hearing in this matter was held on September 29, 2016, in Beaver Dam, Wisconsin. The parties provided oral arguments at the end of hearing, at which point the record in this matter was closed.

On October 28, 2016, Examiner Carne issued a proposed decision affirming the suspension. No objections were filed and the matter became ripe for Commission consideration on November 29, 2016.

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

FINDINGS OF FACT

1. Department of Corrections is an agency of the State of Wisconsin which operates prisons and correctional facilities. One such facility is Dodge Correctional Institution (“DCI”) located in Waupun, Wisconsin.

2. Adam Krueger is employed as a Correctional Sergeant at DCI, and he had permanent status in class at the time of his discipline.

3. On August 13, 2015, Krueger was observed at his work station in the DCI lobby watching a YouTube video on a DCI computer. The video was not related to his duties as a Correctional Sergeant.

4. In June, July, and August of 2015, there also were other occasions on which Krueger spent an unknown number of hours while working at DCI watching internet videos that were not job-related.

5. DOC policies prohibit employees from using information technology resources such as computers to stream videos that are not job-related. Krueger was aware of this prohibition.

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 had just cause within the meaning of § 230.34(1)(a), Stats., to suspend Adam Krueger for five days.

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

ORDER

The appeal is dismissed.

Signed at the City of Madison, Wisconsin, this 15th day of December 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.

Further, 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.

Adam Krueger 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 these cases, the Respondent has the burden to establish that an employee was guilty of misconduct and that the misconduct constituted just cause for the imposed discipline. *Reinke v. Personnel Board*, 53 Wis. 2d 123 (1971); *Safransky v. Personnel Board*, 62 Wis.2d 464 (1974).

Krueger's work assignments at DCI rotate between the lobby, control center, and dining room. As a Sergeant, he performs as a lead worker in all these areas. Krueger's job in the lobby, generally, is to work with another correctional officer to process visitors to the institution.

On August 13, 2015, Krueger was working in the lobby area when a DCI-employed Lieutenant entered the institution through a sallyport door. As the Lieutenant was coming in, he observed Krueger watching a video on the computer in his work area. The Lieutenant asked Krueger if he was watching YouTube, and Krueger admitted that he had been. The officer reported Krueger's activity to DCI's Security Director. A subsequent investigation into Krueger's conduct resulted in a five-day suspension for Krueger's failure to comply with DOC policies and inattentiveness while on duty.

When questioned during the investigation, Krueger admitted he had been watching YouTube videos on the day in question. DOC also enlisted Nathan Harper ("Harper"), a Business Services Section Chief from DOC's IT Division, to review the internet activity associated with Krueger's computer account. Harper generated a report indicating that Krueger had streamed somewhere between 253 and 278 hours of video over a period of 36 days between June 27, 2015, and August 25, 2015.

The evidence presented at hearing in the form of the internet activity report is only mildly persuasive. For each day monitored, the report contains totals for both video bytes downloaded and video hours downloaded. Harper testified that the hour totals were generated by developing an equation for each of three internet sites, Wikipedia, Verizon, and Yahoo, that translated bytes into hours. The hour totals, however, do not necessarily reflect time Krueger spent watching videos. As Harper explained, even if an employee closes a video before watching it to the end, the entire video is still downloaded, and the total number of bytes for the video will still be attributed to the employee's account. For this reason, the equations translating bytes into hours have the potential to suggest more viewing time than Krueger actually enjoyed. Certainly this explains days such as June 27, 2015, on which a range of 29.1 to 32 hours of viewing time is attributed to Krueger.

Nonetheless, the bytes attributed to Krueger's account confirm that he was downloading internet content on August 13, 2015, and indicate that he was doing so on other days during the reviewed period, as well. While Krueger denies having watched the significant number of hours reflected on the report, he admits to having watched prohibited internet videos on the job. Thus, DOC had just cause for his discipline.

Krueger's main contention in support of his appeal is that the investigation into his conduct was flawed. Specifically, Krueger argues that the 5 months and 2 days DOC took to complete the investigation were too long, particularly in light of DCI's decision to close other investigations without discipline due to the sheer duration of those investigations. Krueger points specifically to five investigations that were closed with no discipline in January, April, and August of 2014, due to DCI's determination that there had been "significant delay in taking action".

DOC has shown, however, that there are several respects in which these other disciplinary matters are distinguishable from Krueger's. Marc Clements, DCI's former warden who directed the five investigations to be closed without action, testified that the fact that he had just become warden at DCI had some impact on those decisions, and the matters all involved minor attendance infractions. DOC had the discretion to view Krueger's matter differently and a reasonable basis for doing so. Moreover, while DCI may not have conducted the most expeditious investigation into Krueger's conduct, there is no indication before us that Krueger was denied due process or prejudiced in his ability to defend himself against the allegations.

Krueger also argues that he never watched videos while he was busy and no harm resulted from his activity. Apparently Krueger did not fail to complete tasks, he did not misplace equipment, and he did not allow prisoners to escape. The absence of actual harm, however, does not excuse an undisputed rule violation.

Signed at the City of Madison, Wisconsin, this 15th day of December 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner