

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MATHEW GRABOWSKI, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0058

Case Type: PA

DECISION NO. 36756

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**Appearances:**

Troy Bauch, Field Representative, AFSCME Wisconsin Council 32, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, appearing on behalf of Mathew Grabowski.

Amesia Xiong and William Ramsey, Legal Counsel, Department of Administration, 101 East Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

**DECISION AND ORDER**

On May 26, 2015, Mathew Grabowski filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting he had been suspended for one day without just cause by the State of Wisconsin Department of Corrections. The Commission assigned the appeal to Hearing Examiner Lauri A. Millot who conducted a hearing on March 16, 2016, in Stanley, Wisconsin. On June 15, 2016, the parties submitted oral arguments. Subsequently, the Commission assumed responsibility for directly deciding this matter and Commissioners Rodney G. Pasch and James J. Daley reviewed the record.

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

**FINDINGS OF FACT**

1. Mathew Grabowski is employed as a Correctional Officer 2 by the Department of Corrections at the Stanley Correctional Institution (“SCI”), and he had permanent status in class at the time of his discipline.

2. DOC is an agency of the State of Wisconsin that operates SCI in Stanley, Wisconsin.

3. On October 5, 2011, DOC determined that Grabowski's physical contact with an inmate violated DOC's use of force policy, and Grabowski was suspended for one day for negligence and the use of poor judgment.

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 Mathew Grabowski with a one-day suspension.

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

### **ORDER**

The one-day suspension issued to Mathew Grabowski is rejected and he shall be made whole for all lost wages and benefits.

Signed at the City of Madison, Wisconsin, this 6th day of December 2016.

### **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner

Commissioner James R. Scott did not participate.

**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.

Mathew Grabowski had permanent status in class at the time of his suspension and his appeal alleges that the discipline was not based on just cause.

The State has the burden of proof to establish that Grabowski 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).

DOC's written use of force policy contains various purposes for which non-deadly force may be used. The eighth of these reasons permits such tactics for the purpose of enforcing a DOC rule, a posted policy or procedure, or an order of a staff member; and the parties agree that this reason aligns with the circumstances encountered by Grabowski. DOC points out, however, that the use of force policy also contains a blanket requirement that an officer must "reasonably" believe that force is "immediately necessary," and DOC argues that Grabowski's use of force in this case did not meet this standard.

On October 5, 2014, Grabowski was working in Housing Unit 4 at SCI when he noticed an inmate who appeared to be washing something in a sink on the other side of the Housing Unit 4 dayroom which was a fair distance away. Based on the inmate's movements, Grabowski did not believe the inmate was washing dishes, which Grabowski understood to be the only items inmates were permitted to wash in a dayroom sink.

Grabowski walked over to the inmate and, only a few seconds into the ensuing exchange, the inmate turned to walk away. Rather than giving the inmate a verbal command to stop, Grabowski attempted to take hold of this inmate's arm. The inmate jerked away, turned to face Grabowski, and said, "you can't touch me."

Once the inmate had stopped walking away, he gave Grabowski the item he had been washing in the sink. It was a green fabric item which Grabowski shook out to determine was nothing more than a pair of pants.

After this exchange, the inmate told Grabowski he wanted to talk to a supervisor about what had happened. Grabowski summoned Sergeant Flater, the supervising officer on the unit. Flater explained to Grabowski that Housing Unit 4 inmates are permitted to wash clothes in the dayroom sink and Flater had Grabowski apologize to the inmate. Also, the inmate apologized to Grabowski for having not followed Grabowski's directive.

Flater told a Unit Manager about the event and that individual completed an incident report.

DOC's decision to impose discipline here was based primarily on its investigators' conclusion that Grabowski's version of events was not correct. Grabowski consistently has indicated that he did not know what the inmate had in his hands and, therefore, upon approaching the sink he asked the inmate, "what are you doing?" The investigators, however, relied on statements made by the inmate and Flater, both of whom reportedly stated that when Grabowski approached the inmate he more specifically told the inmate he was not supposed to be washing clothes in the sink. Based on this information, the investigators concluded that Grabowski must not have felt the need to restrain the inmate due to some concern about contraband.

This case rises or falls on the evidence the parties brought to bear at the hearing rather than during DOC's investigation. *Brister-Cooper v. University of Wisconsin*, Decision No. 32290 (WERC, 03/08). The inmate's investigatory statements were revised at hearing when the inmate agreed that Grabowski may have asked more generally, when he approached the sink, what the inmate was doing rather than making a reference to clothes.

Flater was not called to provide testimony at hearing. Moreover, because Flater was not present for the interaction between Grabowski and the inmate, any account he was able to provide as to what occurred was only second hand. Most compelling to us with regard to Flater are the actions he took in response to hearing about the incident from Grabowski and the inmate. DOC's policy requires any use of force incident to be followed by (1) a medical assessment of all parties, (2) a report by the supervisor to the warden or the warden's designee, and (3) the completion and submission of form DOC-2466. Flater took none of those steps. Instead, he simply sent an email message to the unit manager. These facts indicate that the interaction between Grabowski and the inmate did not strike Flater as a use of force incident at all.

Investigators also found Grabowski not credible because he was not able to justify his determination that the inmate was trying to "flee." DOC's argument is that, with or without contraband, the inmate was in a confined space so Grabowski could not have reasonably believed there was risk of flight. DOC's alleged clarity with regard to this point, however, is contradicted by the testimony of its witnesses. Whereas SCI's Warden testified at hearing that

the inmate clearly was not trying to flee, SCI's Security Director testified that the inmate in question was undisputedly trying to flee.

Moreover, if confinement within an institution negates the need to use force on a fleeing inmate, one would expect to see a bright line rule stating as much in DOC's use of force policy, but such a rule does not exist. The same is true regarding DOC's assertion in this case that Grabowski should not have acted as he did because single officer use of force tactics are not to be used. These, too, are not expressly prohibited by the use of force policy. Similarly, DOC has asserted that the phrase "immediately necessary" in its policy equates to "immediate threat," but that particular phrase cannot be found in the policy.

The absence of such strict parameters in the use of force policy seems to be for good reason. Multiple witnesses at hearing testified that the proper response to a situation involving factors at play in Grabowski's case would depend on an officer's heat-of-the-moment assessment of the totality of the circumstances involved in a situation. It is no surprise that DOC's use of force policy embodies a certain amount of vagueness, which allows DOC officers the necessary discretion to act in situations involving innumerable unpredictable circumstances.

This reality fits with the fact that DOC's policy also allows for a margin of error in determining whether force is necessary. The policy establishes that even "potentially erroneous" beliefs regarding the need for force may be reasonable. The DOC Security Director who conducted the use of force review of Grabowski's actions testified to a hypothetical situation—one he reported was used in DOC officer training—in which an officer's erroneous belief would be considered reasonable. The hypothetical goes as follows: an officer in a tower sees an inmate on a recreation field running toward an officer on the field, notes an item glinting in the inmate's hand, and shoots the inmate believing the item is a weapon with which the inmate intends to injure the officer. If the margin of error in DOC's policy excuses this erroneous conclusion, in our view Grabowski's erroneous conclusion that the inmate might have been trying to walk away with contraband also falls within the range of reasonable.

Hindsight may have suggested a better way for Grabowski to have dealt with the inmate. Even Grabowski has acknowledged that he would do things differently the next time. Notwithstanding that fact, the approach Grabowski chose in the moment was not clearly prohibited by DOC's use of force policy and, based on the totality of the circumstances, was not unreasonable. While Grabowski's interaction with the inmate may have been an opportunity for instruction, DOC has not proven that it was just cause for discipline.

Signed at the City of Madison, Wisconsin, this 6th day of December 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner

Commissioner James R. Scott did not participate.