

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EDWARD F. WALL, JR., Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF JUSTICE, Respondent.

Case ID: 10.0004

Case Type: PA

DECISION NO. 36758

Appearances:

Lester A. Pines and Susan M. Crawford, Attorneys, Cullen Weston Pines & Bach LLP, 122 West Washington Avenue, Suite 900, Madison, Wisconsin, appearing on behalf of Edward F. Wall, Jr.

Anne E. Bensky and Katherine Spitz, Assistant Attorney Generals, Department of Justice, 17 West Main Street, P.O. Box 7857, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Justice

DECISION AND ORDER

On July 1, 2016, Appellant Edward F. Wall, Jr., filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting that the State of Wisconsin Department of Justice did not have just cause to discharge him from his position as Program and Policy Manager at the Division of Law Enforcement Services. The full Commission heard the matter on September 13 and 14, 2016, in Madison, Wisconsin. The parties submitted written argument, the last of which was received on October 14, 2016, whereupon the record was closed and the matter became ripe for Commission action.

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

FINDINGS OF FACT

1. Appellant Edward F. Wall, Jr., was employed by the Wisconsin Department of Justice in March of 2016. He had permanent status in class.

2. The Wisconsin Department of Justice (DOJ) is a state agency headed by a constitutional officer, the Attorney General.

3. Wall began his employment with DOJ in 1999 and worked continuously for that agency until March of 2013. At that time, Wall served as administrator of the Division of Criminal Investigation (DCI) in the classified service.

4. On March 5, 2013, then Attorney General J. B. Van Hollen granted Wall a leave of absence in order to facilitate his appointment as Secretary of the Wisconsin Department of Corrections (DOC) by Governor Scott Walker. The position was not in the classified service.

5. On February 5, 2016, Wall resigned his position as secretary of the DOC.

6. By letter dated February 10, 2016, Wall advised Attorney General Brad Schimel of his intention to seek restoration of the civil service position of administrator of DCI that he had previously held.

7. On February 15, 2016, Wall was officially restored to the civil service position he had previously held, and on that same date he was advised that he would be placed on administrative leave with pay during the pendency of an ongoing investigation of DOC's juvenile facilities at the Lincoln Hills School for Boys and the Copper Lake School for Girls.

8. On March 1, 2016, Wall was notified that effective March 20, 2016, he would be placed in a position entitled Program and Policy Manager (Deputy Division Administrator) within the DOJ.

9. During the period following his departure from the position of DOC secretary, Wall had several conversations with Rich Zipperer, Governor Walker's Chief of Staff, about his personnel issues at the DOJ.

10. On or about March 10, 2016, Wall left a voicemail message for Zipperer requesting his personal email address and asking that the information be sent to Wall's personal email address. The purpose of the request was to send a document which reflected the basis for a civil service appeal Wall intended to pursue.

11. Zipperer spoke with Wall and declined to provide his personal email address. He further informed Wall that there was no purpose in having the Governor's office receive the document Wall had referenced in his previous voicemail message.

12. The following day, Wall sent a note along with the appeal document to Zipperer's home address. Wall had done research to determine Zipperer's home address.

13. Zipperer responded in writing the following day disputing Wall's references to evading the public records law requirements and the suggestion that Wall was doing so at Zipperer's request.

14. Following an investigation, DOJ discharged Wall on April 15, 2016, for attempting and/or encouraging efforts to evade Wisconsin public records laws.

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)(d), Stats.

2. The State of Wisconsin Department of Justice had just cause within the meaning of § 230.34(1)(a), Stats., to terminate Edward F. Wall, Jr.

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.

Dated at 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

Following his resignation as secretary of the Department of Corrections, Edward F. Wall, Jr. intended to return to the position he held previously in the classified service. The Wisconsin civil service system guarantees such a return to employees who have left the service to accept appointments from the governor (or other various officials) into an unclassified position. § 230.33(1), Stats.

Wall's plan to return to his former classified position was interrupted by intervening events. The position he had previously held was administrator of the Division of Criminal Investigation in the Department of Justice. The DCI was involved in investigating alleged misconduct at the Lincoln Hills School for Boys and the Copper Lake School for Girls. Both facilities are operated by DOC. The allegations of misconduct at the juvenile facilities had received widespread publicity and had arisen during Wall's employment at DOC. The DCI had initially assigned 50 agents to the Lincoln Hills investigation obviously making it a high priority matter. By February of 2016 the role of DCI began to diminish as the Federal Bureau of Investigation entered the picture.

When Wall sought reinstatement to his previously held civil service position as head of DCI, the Attorney General and senior staff determined that, because of the pending Lincoln Hills investigation, it would be prudent to place Wall on paid administrative leave until the investigation was completed. Their concern focused on a potential public perception of a conflict of interest. Had Wall been reinstated, it would have placed the former head of the agency being investigated in charge of the agency doing the investigation. Wall believed those concerns were bogus and that the ultimate intent was to deny him the position which he believed he was statutorily entitled to. The events that followed and which gave rise to the decision to terminate Wall are not in dispute.

Wall had discussed DOJ's decision to place him on administrative leave and the transfer to another position with Rich Zipperer, the Governor's Chief of Staff. Zipperer had generally advised Wall that the dispute concerned civil service law and was between himself (Wall) and DOJ. In Zipperer's view, this was not a dispute that the Governor's office should be involved in.

On March 5, 2016, Wall called Zipperer and left a voicemail message requesting that Zipperer provide Wall with his personal email address in order that Wall could provide Zipperer with a draft document challenging the failure to restore him to the DCI position. The following day, Zipperer called Wall and informed him that he would not provide his personal email address and that emailing such a document to his personal email would be inappropriate. He also informed Wall that there was no purpose in sending the document to the Governor's office.

On March 10, 2016, Zipperer received, at his personal residence, a letter from Wall together with a ten page document entitled, "Wisconsin Employment Relations Commission

Career Executive Reassignment Appeal.” In the cover letter accompanying the appeal, the first paragraph read as follows:

I know that you didn't want me sending this electronically or to the office because of the records issue, so I elected instead to send it to your home in writing and would ask that you feel free to shred it once you've looked it over. Nobody will know that I sent it and this is strictly between you and me. I understand the concern the administration has over creating records Rich, but I can't let that harm me or my family worse than we've already been harmed.

R.Ex.14

In the view of DOJ, the letter was an attempt to circumvent the state public records law, as well as a suggestion to Chief of Staff Zipperer that he do so. As DOJ saw it, Wall sent the document to Zipperer's personal residence for the purpose of avoiding the creation of a public record.

We conclude that Wall's communication both in content and manner of delivery was a clear attempt to avoid application of the open records provisions of state law. The above-cited language from the first paragraph of the cover letter is an obvious invitation to evade the law. The references to the "records issue" and shredding the document clearly reference keeping this matter out of the public domain. Additional comments about "[n]obody will know that I sent it" and concerns over "creating records" all evidence an obvious intent to avoid the law.

Wall's explanations do not ring true. If he believed that his ten page appeal was a non-disclosable "draft," why send it to Zipperer's personal residence? While it is correct that the question of what is a public record can often be a puzzling legal issue, here Wall understood that the document indeed was a public record and that the only way to avoid the required disclosure was to unlawfully keep it "strictly between you and me" as Wall proposed. Chief of Staff Zipperer did the right thing by disclosing Wall's clumsy attempt to evade the law. Once the communication was disclosed, the Attorney General had no choice but to terminate Wall. The action of a high level administrator attempting to evade the law would significantly undermine the DOJ had lesser discipline been imposed. The court's decision in *Sanfransky v. Personnel Commission*, 62 Wis. 2d 464, 476, 215 N.W.2d 379 (1974), teaches that the obligations and demands placed on different government positions may justify differences in discipline. While a DOJ clerk might have escaped punishment altogether for similar behavior, Wall's high level position demanded a different result.

While we recognize that Wall did have many years of distinguished service and that he genuinely was concerned about his career, we note he was not without adequate remedy. This

Commission certainly had the authority to restore Wall had he prevailed on his appeal. Wall was no doubt aware from his service at the DOC that we are not a management rubberstamp. Furthermore, Wall was on a paid leave of absence at the time of his termination and there was no indication that his position was in jeopardy.

We are satisfied that the conduct described above constitutes sufficient just cause to support the decision to terminate Wall's employment.¹

Dated at Madison, Wisconsin, this 15th day of December 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

¹ We express no opinion about the remaining bases for discharge as reflected in the termination letter.