

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TIMOTHY BENIKE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0187

Case Type: PA

DECISION NO. 36925

Appearances:

Sean Daley, Staff Representative, AFSCME District Council 32, 8033 Excelsior Drive, Madison, Wisconsin, 53202, appearing on behalf of Timothy Benike.

Cara Larson, 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 January 13, 2017, Appellant Timothy Benike filed a timely appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting he had been suspended for three 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 March 3, 2017, in Plymouth, Wisconsin. At the close of hearing, the parties each made oral arguments and the record in this matter was closed.

On March 31, 2017, Examiner Carne issued a Proposed Decision and Order rejecting the suspension. The State filed objections and Benike filed a response. This matter became ripe for our consideration on April 7, 2017.

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 that operates prisons and other correctional facilities, including the Kettle Moraine Correctional Institution (KMCI).

2. Timothy Benike is employed as a Correctional Officer 2 at KMCI, and he had permanent status in class at the time of his discipline.
3. On November 2, 2016, Benike used physical force on a KMCI inmate.
4. Benike's use of physical force did not violate any applicable policy or work rule.

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 Timothy Benike from his employment for three days.

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

ORDER

The suspension of Timothy 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 9th day of May, 2017.

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.

Timothy 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.

The State has the burden of proof to establish that Benike 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 November 2, 2016, Timothy Benike was working in the KMCI restrictive housing unit, which is where inmates in segregation are held. Benike and other correctional officers had been tasked that day with the job of changing lightbulbs, including those inside the inmate cells. To do so, they had to remove the inmates from their cells, and the officers decided this would be a convenient time to allow the prisoners to shower.

Two days prior, one of Benike's coworkers had experienced trouble with Inmate Pfaff, so Benike took the lead when it came time to remove Pfaff from his cell. At first, Pfaff did not comply with Benike's repeated orders to come to the door of his cell. Eventually though, Pfaff complied and was handcuffed behind his back to be escorted to the shower. As Pfaff was exiting his cell, he became verbally belligerent, calling Benike a "fat fucker" at one point.

Video taken by a camera located at one end of a hallway shows Benike escorting Pfaff down the hall toward a door at the other end. At the near end of the hall, Benike has a hand on Pfaff's left arm, and Pfaff can be seen making a half-hearted effort with his right foot to kick a trash can as they pass it. Then, the footage shows Benike and Pfaff looking at each other, still walking. The video contains no audio, but Benike recounted that after the trash can maneuver he told Pfaff not to resist or try to pull away again. Pfaff replied by calling Benike another name and asking him, "what are you going to do about it?" When Benike and Pfaff reach the far end of the hall, the camera footage shows Benike suddenly and forcefully pushing Pfaff up against a wall and then, a second later, quickly taking Pfaff to the ground.

DOC disciplined Benike for his use of force in this situation. In an effort to show just cause, DOC has contended that Benike should have notified someone, before the escort, that Pfaff was being difficult; that Benike should have performed a "wall stabilization" technique

rather than the more forceful “wall stun” with Pfaff; and that Benike did not need to take Pfaff to the ground and did not sufficiently control his descent when doing so. DOC, however, can point to nothing specific in its training materials or use-of-force policy that expressly mandates choices in these areas contrary to those made by Benike.

DOC takes the position that even though the use-of-force policy does not expressly prohibit Benike’s actions, he violated the policy by not following its general mandate limiting the use of force to that which is necessary and least likely to cause injury. To that extent, DOC’s response is not unlike that encountered in the recently issued *Grabowski v. Department of Corrections*, Dec. No. 36756 (WERC, 12/16). In both cases, a correctional officer made a split-second decision to use physical force based on a confluence of factors not specifically contemplated in use-of-force training. In both cases, DOC conducted a lengthy, after-the-fact, arm-chair analysis that concluded there would have been better ways to handle the situation.

There are several problems with such a conclusion. First, as discussed in *Grabowski*, the use-of-force policy necessarily gives correctional officers some latitude to determine how to respond to a situation. It even allows them to draw erroneous conclusions under certain circumstances, without suffering consequences. Therefore, the mere fact that DOC is able to come up with alternatives to Benike’s approach does not automatically translate into a discipline-worthy policy violation.

Second, the conclusion in this case that there were better alternatives is not clearly correct. KMCI’s warden, Robert Humphreys, testified at hearing that what Benike did was so obviously inappropriate that he immediately considered (and recommended to DOC’s central office) Benike’s discharge. This inclination is completely incongruous, though, with several factors at play here. The reading of the situation by Humphreys and DOC is based in part on the conclusion that Benike performed a wall stun on Pfaff. Yet the evidence is not clear as to whether Benike’s maneuver was a wall stun or a less forceful wall stabilization. Further, several witnesses testified at hearing that under the circumstances they would have acted just as Benike did, perhaps even sooner. These officers had the same training as Benike and also work at KMCI.

Third, no one else was standing in Benike’s shoes during the incident in question. Pfaff already had shown several signs of being uncooperative and belligerent. Benike contends that at the far end of the hall Pfaff tensed his arm and pushed his weight into Benike with his shoulder, and this is the event that caused him to push Pfaff up against the wall; and then Pfaff pushed back when he was against the wall, and this is what prompted Benike to take Pfaff to the ground. Contrary to arguments made by both parties, the camera footage is simply not clear enough to see whether Pfaff engaged in this behavior. Nevertheless, Benike is a 20-year KMCI correctional officer who undisputedly never has been involved in a use-of-force incident in the past. One is left to wonder at the motivation for not giving his version of events the benefit of the doubt.

Signed at the City of Madison, Wisconsin, this 9th day of May, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner