

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NICOLE HAFEMANN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0191

Case Type: PA

DECISION NO. 36932

Appearances:

Sean Daley, Field Representative, AFSCME Wisconsin Council 32, P.O. Box 19, Ashippun, Wisconsin, appearing on behalf of Nicole Hafemann.

Anfin Jaw, Attorney, Wisconsin 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 February 6, 2017, Nicole Hafemann filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting she had been suspended for one day without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Peter G. Davis for the purpose of receiving evidence and argument and issuing a proposed decision and order.

The parties filed a Stipulations of Facts in lieu of a hearing and then made oral argument on April 7, 2017.

Examiner Davis issued his proposed decision on April 17, 2017, and the Wisconsin Department of Corrections filed timely objections. Both sides submitted briefs in support of their position.

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

FINDINGS OF FACT

1. Nicole Hafemann has been employed as a social worker by the State of Wisconsin Department of Correction for 19 years and had permanent status in class when she was suspended.

2. Hafemann saw an inmate with a bandaged wrist and jokingly made a masturbatory gesture and related comment to a coworker suggesting a possible cause for the wrist injury. As to the gesture, Hafemann did not intend for the inmate to be aware of same. Hafemann apologized to the inmate later the same day.

3. Hafemann was suspended for one day for the conduct described in Finding of Fact 2.

4. Hafemann had a clean disciplinary record prior to the suspension.

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, Stats., to suspend Nicole Hafemann for one day.

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

ORDER

The suspension of Nicole Hafemann is rejected and the State of Wisconsin Department of Corrections shall immediately make her whole and remove the suspension and any reference to a violation of the Prison Rape Elimination Act from her record.

Signed at the City of Madison, Wisconsin, this 12th day of June, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This case involves a one-day disciplinary suspension given to Nicole Hafemann, a social worker employed by the Wisconsin Department of Corrections at the Kettle Moraine Correctional Institution. There is no dispute that Hafemann engaged in the conduct in question. Our decision is to determine whether the conduct violated the rules utilized by DOC as a basis for its imposition of discipline.

The matter was submitted to the examiner and in turn to us based upon a stipulation of facts and a series of exhibits.¹ The examiner concluded that Hafemann's behavior did not constitute just cause for the imposition of a one-day disciplinary suspension. He directed that the suspension be changed to a letter of instruction. We agree that there was no just cause for the suspension but modify the order by eliminating the letter of instruction and further direct that the Prison Rape Elimination Act finding be expunged from the record.

The facts are simple. Inmate Eckels approached Hafemann and Sergeant Helmrick with his wrist in a bandage. Hafemann, holding up a book to block Eckels' view, made a masturbatory gesture and made a comment that "she didn't know that you could hurt your wrist doing that." The observation was made in a joking manner and elicited that reaction from several bystanders. The record is unclear as to whether inmate Eckels saw the gesture or even heard the comment.

DOC, pursuant to the Prison Rape Elimination Act, 42 U.S.C. § 15601, maintains a complaint procedure for inmates to utilize to complain about purported violations of the Act or its administrative rules set forth at 28 C.F.R. § 115, et seq. Relevant to this matter the regulations define sexual harassment as:

Repeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.

That identical language is repeated in DOC Executive Directive 72 which formed part of the basis for DOC's conclusion that Hafemann should be disciplined.

We agree with the examiner that the conduct was not "repeated." In fact, Hafemann apologized to both Helmrick and the inmate shortly after the occurrence. The conduct was inappropriate but certainly not "grossly" so nor is there any evidence the inmate was "deeply offended."² It is hard to imagine that a career criminal would be "deeply offended" by this conduct committed by a middle-aged, female social worker.

¹ It is unclear whether we are to accept the exhibits to prove that various events occurred or that the statements contained therein are accurate representations of what witnesses would testify to if called.

² We take official notice of the criminal record of the inmate as set forth in the Circuit Court Access Program which reflects the fact that the 28-year-old has spent most of his adult life in prisons or under supervision for a variety of offenses including armed robbery and drug trafficking.

Equally vacuous is the notion that Hafemann's conduct could have set off some type of revolt or riot endangering Helmrick's safety. That type of hyperbole simply undermines a party's position. Regardless of the manner in which Hafemann's conduct is characterized, the bottom line is that it was not "repeated" and therefore did not violate the rule relied upon by DOC.

DOC also asserts in the alternative Hafemann's conduct violated the "revised" Rule 14. In the stipulation of facts and documents, they include the suspension letter which specifies two rule violations. One of those is Rule 2 which incorporates by reference the PREA Executive Directive. As discussed above, we rejected that basis for discipline. The letter also specifies Rule 14 which prohibits "horseplay, practical jokes or other disruptive or unsafe behavior." The conduct Hafemann engaged in clearly does not fall within that definition.

Attached to the brief submitted in support of DOC's objections is a copy of a revised disciplinary letter dated December 28, 2016 (dated one week after the first letter). The revised letter includes a new iteration of Rule 14 which bars:

Intimidating, interfering with, harassing, demeaning, treating discourteously, or bullying; or using profane or abusive language in dealing with others.

The problem with our considering this document is that it was not included in the original stipulation. Counsel is not free to unilaterally supplement the record after the examiner has issued his decision. At that point the record is closed and, absent a motion or stipulation from the opposing party, neither party is entitled to submit additional evidence.

We conclude that Hafemann's conduct, as a single event, does not violate either the PREA or Rule 14 as set forth in Exhibit 7 and, accordingly, reject the discipline.

Signed at the City of Madison, Wisconsin, this 12th day of June, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner