STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATTHEW HANNEMAN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0213
Case Type: PA

DECISION NO. 36991

Appearances:

Marshall L. Belton, P.O. Box 930393, Verona, Wisconsin, appearing on behalf of Matthew Hanneman.

Cara J. Larson, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of State of Wisconsin, Department of Corrections.

DECISION AND ORDER

On July 5, 2017, Appellant Matthew Hanneman filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting that he had been discharged from his employment without just cause by the State of Wisconsin Department of Corrections. The Commission assigned the appeal to Hearing Examiner Karl R. Hanson who conducted a hearing on August 22, 2017, and August 25, 2017, in Madison, Wisconsin.

On September 5, 2017, Examiner Hanson issued a Proposed Decision and Order modifying the discharge to a three-day suspension. The State filed objections, the Appellant filed a response, and the matter became ripe for Commission action on September 18, 2017.

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

FINDINGS OF FACT

1. Matthew Hanneman was employed by the State of Wisconsin Department of Corrections for approximately 19 years and had permanent status in class at the time he was discharged from his employment.

2. In the years prior to his discharge, Hanneman engaged in inappropriate conduct, some of which demeaned several of his coworkers or treated them with disrespect.

3. Hanneman contacted several coworkers, while off duty, regarding the Department of Corrections' investigation of him despite instructions not to do so.

4. The Department of Corrections discharged Hanneman from employment on April 24, 2017.

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 discipline Matthew Hanneman for demeaning several coworkers or treating them with disrespect.

3. The State of Wisconsin Department of Corrections did not have just cause within the meaning of § 230.34(1)(a), Stats., to discipline Matthew Hanneman for insubordination.

4. The State of Wisconsin Department of Corrections did not have just cause within the meaning of § 230.34(1)(a), Stats., to discharge Matthew Hanneman.

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

ORDER

The Department of Corrections' decision to discharge Matthew Hanneman is rejected. The discipline is modified to be a three-day suspension without pay. Hanneman shall be made whole for lost wages and benefits in excess of a three-day suspension.

Signed at the City of Madison, Wisconsin, this 29th day of September 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

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.

Matthew Hanneman had permanent status in class at the time he was discharged from his employment with the Department of Corrections ("DOC"), and his appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that Hanneman 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). The courts have equated this burden to a reasonable certainty by the greater weight or clear preponderance of the evidence. *Reinke v. Personnel Bd.*, *id.*; *Hogoboom v. Wis. Personnel Comm.*, Dane County Circuit Court, 81-CV 56669, 4/23/84; *Jackson v. State Personnel Bd.*, Dane County Circuit Court, No. 164-086, 2/26/79.

At the time of his discharge, Hanneman had worked at DOC for about 19 years as a probation and parole agent. Hanneman worked at the DOC's Division of Community Corrections office on Badger Road in Madison. In February 2017, Hanneman's coworker, Tasha Gamerdinger, wrote a letter to him before she transferred to another position. Gamerdinger did not give the letter to Hanneman. Instead, she gave it to a superior to review. Gamerdinger testified that she wanted to make sure it was appropriate for her to give the letter to Hanneman.

In the letter, Gamerdinger made several accusations about Hanneman's conduct. After reading the letter, the supervisor reported its contents to her superiors, and DOC initiated an investigation of Hanneman.

I. Misconduct Related to Treatment of Others

DOC proved that Hanneman committed misconduct in several instances that were alleged by Gamerdinger or subsequently discovered during DOC's investigation. The following are included among the proven misconduct. Hanneman demeaned Gamerdinger by: refusing to talk with her when she addressed work matters with him; not making eye contact with her; and only conveying information she needed to do her job by speaking to her indirectly (addressing those

around her). He demeaned two offenders in email messages. He referred to one, who worked as a certified nursing assistant, as a prostitute and another as a psycho. Hanneman responded over his State email account to a female coworker organizing a cookie exchange, saying, "My brother actually makes some amazing blue balls. Or do you prefer the black ones?" with a smiley face icon after the question. The comment was sexually charged (despite Hanneman's weak protestation otherwise at hearing) and demeaning. He demeaned and failed to treat two female coworkers with respect by making light of rape. After failing to attend diversity training because he got into a verbal altercation with a receptionist, Hanneman told two female coworkers, "It's not like I raped her." His coworkers told him that such a statement was extremely offensive and he should not say it again. He nonetheless chose to repeat it to them within moments.

DOC also proved that Hanneman committed inappropriate or unprofessional acts which do not rise to the level of misconduct. Included among that conduct are the following. Hanneman used his State email account to start a political discussion with a coworker about Hillary Clinton's presidential campaign. In that email he created a "playlist" for Clinton's campaign and said he included a Dr. Dre song to "win over the Black Lives Matter crowd." Separately, Hanneman replied by email to several coworkers, including one with ties to Mexico, saying, "This will be my third [offender] from Minnesota in the last year. Do we need to build a wall between Wisconsin and Minnesota?" (with a smiley face icon after the question). Once, when Hanneman needed to take a male offender into custody he asked a male coworker for assistance and did not ask any female coworkers for help. Hanneman's supervisor, Michele Krueger, addressed complaints from offenders and their families about Hanneman during monthly meetings with him and in his performance evaluation.

DOC did not prove that Hanneman committed other acts alleged by DOC or its witnesses.[1] Included among the acts DOC failed to prove are the following. It was alleged Hanneman transferred offenders who are black women away from his caseload because of their race and gender. Hanneman did not control when or how cases were assigned or transferred. No evidence was offered to demonstrate that his caseload was demographically any different than that of other agents or that, if so, it was due to Hanneman's inappropriate actions. It was alleged Hanneman made racially inappropriate comments to offenders or coworkers and that he treated black offenders differently than white offenders. No facts supporting such conclusions were offered or proven. Several witnesses testified regarding their opinions of Hanneman's biases. None provided any details or examples. Their testimony was devoid of factual support.

II. Insubordination

While the investigation related to the conduct discussed above was ongoing, DOC alleges that Hanneman was insubordinate. On February 27, 2017, DOC provided Hanneman a written notice directing him to attend an investigatory interview on March 3, 2017. In the notice, DOC

[1] DOC's witnesses offered conclusory statements asserting that Hanneman acted as described here. When asked for details or specific allegations, witnesses responded with statements such as "it happened so much I can't think of one specific incident." DOC failed to produce any evidence that Hanneman committed acts that would conform to the opinions about him that the witnesses shared. Nonetheless, Hanneman may be wise to consider why several witnesses, including those who testified they were his friends, believe that he demonstrates such biases.

stated, "You are directed to refrain from discussing the facts related to this behavior alleged above with anyone other than your representative and the persons conducting the investigation." The behavior referred to in the letter was "potential work rule violations related to statements allegedly made by you that were racial and sexual in nature." At the time the February 27, 2017 notice was delivered, Lance Wiersma, a regional chief in the Division of Community Corrections, verbally directed Hanneman not to discuss the investigation with any of his coworkers. He also informed Hanneman that he was temporarily reassigned to work at the Verona Road office.

Hanneman was upset and requested the rest of the day off from work. Wiersma granted Hanneman's request. While off duty, Hanneman contacted two coworkers regarding the investigation. He asked one if she was questioned. He didn't ask any questions of the second coworker, but complained of an "unfair process" to her. In his third text message, to a larger group of his coworkers, Hanneman said:

> Hey everyone! I'd love to have everyone hang out after work tomorrow. I'd really appreciate it. I was thinking the Coliseum. It's a good central place. Let me know if you can make it.

An employer has a lot of control over the conduct of its employees. This is especially true while an employee is on duty. Generally, however, a public employer may only sanction an employee's off-duty conduct when the employer proves that the conduct has a "tendency to impair [the employee's] performance of the duties of his position or the efficiency of the group with which he works." *State ex rel. Gudlin v. Civil Service Comm. of City of West Allis*, 27 Wis.2d 77, 87, 133 N.W.2d 799 (1965). Additionally, in *Gudlin*, the Supreme Court held that "violations of important standards of good order can be so substantial, oft repeated, flagrant or serious that … the conduct can reasonably be deemed cause for suspension or discharge even though it has no direct bearing upon his performance of duties." *Id*.

There is no dispute that Hanneman violated the directive not to discuss the investigation when he asked a coworker if she was questioned. But, in doing so, he did not commit misconduct. The directive, with regard to his off-duty conduct, was an unreasonable intrusion upon Hanneman's personal liberty. DOC has not proven that such a restriction was appropriate or necessary in this particular case. There is no evidence that Hanneman sought to influence the investigation or intimidate any witnesses. Nor was there a showing that others reasonably feared he would do so. Perhaps a more narrowly crafted directive would have been reasonable.

Hanneman's other contacts with coworkers by text message did not violate the directive. One message came close, when he complained about being treated unfairly. The other, asking if any coworkers want to hang out after work, was unrelated to the investigation. By ordering Hanneman not to talk with his coworkers about the investigation, DOC explicitly permitted Hanneman to talk with them about other matters.

At 10:00 a.m., on March 2, 2017, Wiersma notified Hanneman that he was immediately placed on administrative leave with pay. Wiersma also verbally directed Hanneman to have no

contact with his coworkers while the investigation was pending. Before Hanneman was escorted out of the building, he asked for the restriction to be narrowed, as he wanted to socialize with coworker-friends outside of work. At 10:01 a.m., Hanneman, while off duty and on administrative leave, sent a text message to Bethany Ross. The message said:

> Hey! Just wanted to let you know I'm getting raked over the coals. I was just put on administrative leave without telling me the reason. This is a violation of my rights and I plan to hire an attorney.

Ross was a former coworker of Hanneman's at the Badger Road office. In December of 2016, she was promoted to a supervisory position in central Wisconsin. Hanneman therefore did not violate the "letter" of the verbal directive. Ross was not his coworker. She was at that point a former coworker. Even without splitting hairs to recognize that distinction, however, Hanneman did not commit misconduct. The directive was an overly broad gag order and DOC has not demonstrated that it was a necessary restriction on Hanneman's off-duty liberty.[2]

Hanneman did not commit misconduct when he contacted his coworkers, while off duty, about the investigation. He did not commit misconduct when he contacted coworkers, while off duty, about other subjects.

III. Just Cause

Originally, DOC's management employees recommended Hanneman suffer a three-day suspension for his misconduct related to the treatment of others and a five-day suspension for insubordination for violating the gag orders. This was the recommendation of all those involved in the disciplinary process before the deputy secretary. That included the Administrator of the Division of Community Corrections, Denise Symdon.

Symdon testified that her recommendation for a three-day suspension and a five-day suspension was based on her review of two investigations conducted by DOC. The first investigation related to Hanneman's treatment of others and the second related to Hanneman's alleged insubordination.

After making her recommendation, but before the disciplinary packet was routed to the deputy secretary (as the final step to determine the level of discipline), Symdon learned that Hanneman allegedly committed other misconduct. She learned that Hanneman allegedly made disparaging statements about coworkers, offenders, and court officials in emails. In her testimony, Symdon said that information would have led to a third investigation. She also learned that Hanneman allegedly discussed the investigation at a bar with a coworker while off duty. Symdon stated that information would have led to a fourth investigation.

[2] Wiersma subsequently called Hanneman and modified the directive such that Hanneman was to have no contact with his coworkers during work hours and that outside of work hours he could have contact with them but should not discuss the ongoing investigation. This restriction may be more reasonable, if necessary at all, than the blanket gag order previously imposed. There is no evidence that Hanneman violated this narrower restriction.

Symdon did not initiate a third or fourth investigation, however. Instead, she testified that she went to the deputy secretary. She briefed the deputy secretary on the new allegations and recommended that Hanneman be discharged, instead of suspended. Hanneman was discharged.

No impartial investigation was undertaken. Notice was not given to Hanneman at the time of his pre-disciplinary hearing or prior to the Commission's hearing in this matter that allegations related to the third and fourth "investigations" existed or that they were a basis for the decision to discharge him from State employment. No evidence was presented at hearing regarding the alleged misconduct Symdon referred to that would have been examined in a third or fourth investigation.[3]

All that the record contains is Symdon's assertions that disparaging emails exist and that Hanneman talked with his coworker Brittany Felton about the investigation. No emails were produced and Felton was not called as a witness. DOC has the burden of proving to this Commission by a preponderance of the evidence that just cause existed for discharge. It is not enough to show a division administrator believes evidence exists that might establish just cause. DOC has not proven that Hanneman made disparaging remarks by email or talked with Felton about the investigation.[4]

A three-day suspension for demeaning others and treating them with disrespect and a five-day suspension for insubordination were sufficient levels of discipline according to DOC's management personnel before learning of the alleged additional misconduct. As discussed above, DOC has not proven that Hanneman committed misconduct when he disobeyed its gag order related to off-duty conversations with his coworkers or the blanket gag order prohibiting any contact with his coworkers. Therefore, DOC has not established just cause to discipline Hanneman for insubordination.

The Commission agrees that a three-day suspension is warranted for Hanneman's misconduct related to his demeaning and disrespectful treatment of others.[5] The decision to discharge Hanneman is rejected because DOC did not establish that the misconduct upon which the discharge was premised occurred. It is rejected and modified to be a three-day suspension.[6]

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[3] Had such evidence been presented at hearing, the Commission may have had to determine, as a matter of due process and "fair play," whether DOC was prevented from relying on it now to establish just cause for the discharge.

[4] DOC, of course, is still free to investigate and act on such allegations if they deem it appropriate.

[5] Symdon also testified that she wanted Hanneman permanently reassigned to another office in conjunction with the suspension. This order does not restrict DOC's ability to transfer Hanneman, if DOC so chooses (and if it has authority and/or just cause to do so). *See Siminow v. Dept. of Corrections*, Dec. No. 36919-A (WERC, 5/1/2017).

[6] Hanneman has his job back. He should not read this decision as a vindication of his underlying conduct. He has demeaned people and treated them with disrespect. The fact that DOC failed to prove elements of its case does not mean the Commission condones Hanneman's behavior. He would be wise to examine and modify his behavior and treat people with the basic respect to which they are entitled. If Hanneman does not learn from his errors, DOC may learn from its own errors in building a case against him and succeed in discharging him in the future.

Signed at the City of Madison, Wisconsin, this 29th day of September 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

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Cara J. Larson, Attorney, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of State of Wisconsin Department of Corrections.

DECISION AND ORDER

In a September 29, 2017 decision, the Wisconsin Employment Relations Commission concluded that the State of Wisconsin Department of Corrections did not have just cause to discharge Mathew Hanneman but did have just cause to suspend him for three days. On October 27, 2017, Hanneman filed a motion for fees and costs pursuant to § 227.485(3), Stats. The State filed argument in opposition to the motion on November 7, 2017.

Having considered the motion, the Commission concludes it should be granted in part and denied in part.

NOW, THEREFORE, the Commission makes the following:

CONCLUSIONS OF LAW

1. The position of the State of Wisconsin Department of Corrections as to the discharge was not substantially justified within the meaning of § 227.485(2)f, Stats.

2. An attorney fee in the amount of $7,115 is reasonable and appropriate.

3. Costs for mileage are not available under § 814.04(2), Stats.

4. Costs for copying were not sufficiently documented within the meaning of Wis. Admin. Code § ERC 94.05.

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

ORDER

1. The State of Wisconsin Department of Corrections shall pay Mathew Hanneman $7,115.

2. This Decision and Order is incorporated into the Commission's September 29, 2017 Decision and Order.

Signed at the City of Madison, Wisconsin, this 23rd day of January 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

The ability to award attorney fees and costs in Chapter 230 discipline cases is limited by the provisions of § 227.485, Stats. A qualified prevailing party is entitled to fees and costs unless the Commission "finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust."

Here, as reflected in our September 29, 2017 Decision and Order, the Commission concludes the State of Wisconsin Department of Corrections was not substantially justified in its position in part. The decision to discharge Hanneman (instead of suspending him) was made without an investigation of "new" allegations that prompted the discharge decision, and no evidence was presented at hearing as to those allegations.

As to the fees and costs requested, Attorney Belton's motion included a "Final Billing Statement" of 178.75 hours at a rate $150 per hour. The billable hours included 11 hours for services rendered after the issuance of the September 29, 2017 Commission decision; 43.25 hours attributable to representation related to an unemployment compensation proceeding; and .5 hours attributable to "Copies." None of these hours are recoverable as part of Belton's attorney fees representation before the Commission. Exclusion of these 54.75 hours yields a remainder of 124 hours at a rate of $150 for a total of $18,600 as Attorney Belton's fee that is potentially recoverable.

Attorney Belton's motion also included a "Detail Transaction File List" from the Hawks Quindel, S.C., law firm for 18.3 hours. Review of that document satisfies the Commission that those hours are ultimately attributable to representation of Hanneman in his efforts to contest his discharge before the Commission. However, the Commission finds no basis for an hourly rate that exceeds the $150 rate referenced in § 814.245(5), Stats., and charged by Belton. Therefore, an additional $2,745 in attorney fees is potentially recoverable for a total of $21,345.

The Commission is persuaded that the number of hours spent on this litigation at a $150 rate produces a reasonable total fee of $21,345. *See generally Hensley v Eckerhart*, 461 U.S. 424, 433 (1983). However, because the litigation was only partially successful, it is clear that some reduction in the fee is appropriate. *Reentmeeter v. Wis. Lottery*, Case No. 91-0243-PC (Pers. Comm. 9/94); *see also* § 227.485(4), Stats.

Hanneman reasonably asserts that, when compared to the discharge he was contesting, reinstatement with back pay (minus the three-day suspension) should be viewed as a substantial victory. What is unclear is the appropriate proportionality of that victory in regard to the billing. The State does not provide a suggested apportionment of the fee amount. There were three elements the State used in its discipline of Hanneman; the first of which (demeaning coworkers) was sustained, the second rejected but based on a reasonable basis of law and fact (insubordination), and the third (discharge) which the State did not provide a basis in fact. After giving the matter due consideration, and absent a more nuanced argument from the parties, the

Commission concludes that attorney fees of one-third are appropriate. Therefore, the Commission orders payment of a fee amount of $7,115.[1]

Signed at the City of Madison, Wisconsin, this 23rd day of September 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

[1] As reflected in Conclusions of Law 3 and 4, no costs are awarded.