

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MICHAEL FLIEHR, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0214

Case Type: PA

DECISION NO. 36996

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**Appearances:**

Sean Daley, AFSCME Wisconsin Council 32, Post Office Box 19, Ashippun, Wisconsin, appearing on behalf of Michael Fliehr.

Anfin Jaw, Attorney, Department of Administration, 101 East Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appearing on behalf of State of Wisconsin Department of Corrections.

**DECISION AND ORDER**

On July 7, 2017, Michael Fliehr filed a timely appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting he had been suspended without just cause by the State of Wisconsin Department of Corrections. The Commission assigned Danielle L. Carne to serve as Hearing Examiner. Hearing was held on September 7, 2017, in Chippewa Falls, Wisconsin. The parties submitted oral arguments at the close of the hearing, and on that date the record in this matter was closed.

On September 28, 2017, Examiner Carne issued a Proposed Decision and Order rejecting the suspension. The State filed objections, Fliehr filed a response, and the matter became ripe for Commission consideration on October 5, 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, and DOC's Division of Community Corrections (DCC) oversees offenders on probation or parole living in Wisconsin communities.

2. At the time of the incident that led to his discipline, Michael Fliehr was in training as a DCC Probation and Parole Agent and had permanent status in class at the time the suspension was issued.

3. Fliehr did not fail to “follow-up” on an incident involving one of his assigned offenders in a manner that violated DOC work rules or constituted negligent performance of his duties.

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 Michael Fliehr 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 Michael Fliehr is rejected, and the State of Wisconsin Department of Corrections shall immediately make him whole and remove the suspension from his record.

Signed at the City of Madison, Wisconsin, this 3rd day of November, 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.

Michael Fliehr 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 Fliehr 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).

Shortly before 11:00 p.m. on October 29, 2016, while responding to a call of a suspicious vehicle in a field, Deputy Dan Glaze of the Rusk County Sheriff's Department was fatally shot. The next day Douglas Nitek, a suspect in the crime, was captured. At the time of this incident, Nitek was under the Division of Community Corrections (DCC) extended supervision for an OWI charge, and Fliehr was his assigned probation and parole agent. In response to the shooting, DOC was asked to provide its files regarding Nitek to law enforcement authorities. Also, Nitek's DCC file was subjected to internal review.

Information regarding DCC offenders is kept in a system called "COMPASS". Using this system, DCC employees are expected to maintain chronological documentation of all material information about and interactions with offenders. Entries in the system are made by anyone who works on the offender's case, including the offender's assigned agent, the agent's supervisor, and DCC assistant and regional chiefs.

One set of notes in Nitek's COMPASS file relates to an incident that occurred in July of 2016. The notes indicate that on July 5, 2016, Fliehr received a telephone call regarding Nitek from Wisconsin State Patrol Trooper Clifford Parr. Parr reported that he had been patrolling a highway the night before when he saw a vehicle abruptly swerve across the center line. Parr attempted to pull the vehicle over, but the driver would not stop. Ultimately, Parr ended his pursuit of the vehicle due to safety concerns. Then, reviewing the footage from his dashboard camera, Parr retrieved the vehicle's license plate. The plate number was registered to Linda Nitek, who is Doug Nitek's mother. When Parr contacted the mother, she indicated that she had loaned her car to her son. Having determined that Doug Nitek was an offender supervised by Fliehr, Parr contacted Fliehr to request that he interview Nitek regarding the pursuit incident.

In response to this call, on July 6, 2016, Fliehr held a “staffing” with Corrections Field Supervisor Gwendolyn Cartman of his office. “Staffing” is a term used by DCC for touch-base meetings agents conduct with their supervisors to discuss the status of a case or an event involving an offender. A probationary agent is required to obtain permission, through staffing, to detain or release an offender from custody. Fliehr’s supervisor at the time was Corrections Field Supervisor Kelly Blechinger, but she was not stationed in the same office as Fliehr, and he also was permitted to hold staffings with others. Fliehr held the July 6, 2016 staffing with Cartman because Fliehr intended, in response to the information he had received from Parr, to have Nitek brought into custody.

On July 8, 2016, Parr contacted Fliehr again, indicating that he was on his way to Fliehr’s office to show him video footage of the vehicle pursuit. The video captured a somewhat detailed image of the driver, and Parr hoped Fliehr might be able to determine whether the individual was Nitek. Upon reviewing the video, however, neither Fliehr nor others at DCC familiar with Nitek’s appearance could make out the driver. Parr told Fliehr that he had tracked down Linda Nitek’s vehicle at her son’s house. It was flipped on its hood and bumper stickers were scratched off. Bumper stickers could be seen on the car in the video. Also, Nitek’s mother had revised her prior statement to Parr, now indicating that Nitek could not have been driving her car on the night in question because it was inoperable. Parr indicated to Fliehr that he believed he had enough information to charge Nitek. The warrant for Nitek’s arrest that had been issued by Fliehr was still pending.

Nitek was detained under the warrant on July 9, 2016. At that point, Fliehr interviewed Nitek at the Rusk County jail. Parr also interviewed Nitek. In both interviews, Nitek denied involvement in the pursuit. Nitek told Fliehr that he had been fishing that day, and he stated that the car had been “junked out” several weeks before. On that same day, Fliehr held a staffing with Blechinger. During this discussion, Blechinger concluded that there was not enough information to keep Nitek in custody. The information available to her indicated that Nitek was denying involvement in the incident and asserting that he had an alibi; Nitek’s mother and Nitek had reported that the vehicle had been inoperable; and several individuals who reviewed the camera footage could not identify Nitek as the driver. Also, Blechinger felt that Nitek seemed to have been displaying positive behavior under supervision. Blechinger stated at the time that she wondered if perhaps Rusk County was forcing a charge simply because Nitek was a known offender. Blechinger authorized Fliehr to release Nitek from custody, and she directed Fliehr to follow-up on any charges brought against Nitek.

Later that day, Fliehr made the following COMPASS notation regarding his discussion with Blechinger: “Staffed with CFS Blechinger. Agent will follow on charges from State Trooper Parr and Rusk County Court.” Fliehr also released Nitek from custody, and he called Rusk County to ask about charges. During that call, he was informed that any charges would be filed in Sawyer County. Upon learning that information, Fliehr did not call Sawyer County. Subsequently, on July 16, 2016, Fliehr received an email message about the case that had been forwarded to him from a DCC warrants email account. The email attached a document showing the charges relating to Nitek, and it contained a link to a report that included a narrative of Parr’s investigation. Blechinger also was copied on this message.

Shortly after the fatal shooting of Deputy Glazer in late October of that year, COMPASS notes in Nitek's file contain the following entry: "CFS-Blechinger; After review of the DCC file the July 2016 incident has been re-opened for investigation. I have asked Agent Gunderson to follow up with this investigation." A subsequent disciplinary investigation resulted in Fliehr's one-day suspension for having failed to comply with written policies and for negligence in the performance of his duties.

With respect to the statutory obligation to show just cause, the letter of discipline issued to Fliehr sets forth three shortcomings: (1) he failed to follow-up on the charges as directed by Blechinger, (2) he failed to follow up on information contained in the report narrative linked in the email sent to him, and (3) he failed to follow-up on the alibi information Nitek provided in his interview statement. The evidence and arguments presented by DOC focused nearly exclusively on the failure to follow Blechinger's directive regarding the charges. Giving DOC the benefit of the doubt, one might conclude that reference at hearing to this single alleged failure was thought to encompass the other two. The alternative conclusion is that DOC chose to abandon at hearing two of the three bases for Fliehr's discipline. In any case, the analysis here is necessarily limited to Fliehr's alleged failure to follow-up on charges as Blechinger directed.

Perhaps the most striking problem with the discipline is its timing. Blechinger issued her directive in July, and it was determined in October that some error had perhaps occurred. The fact that it took DOC a few months to discover a negligent act by an employee is not *per se* concerning. What makes the timeline problematic here are intervening events. The record shows that between early July and late October of 2016, Fliehr staffed with Blechinger on three or four occasions regarding a variety of issues related to Nitek, including two urine analyses that showed evidence of drug use. If Fliehr's failure to report back to Blechinger regarding the charges had been negligent, one would assume Blechinger would have been reminded by these various subsequent interactions to take Fliehr to task. DOC asserts that Fliehr, not Blechinger, was assigned to be Nitek's agent, and it was therefore not Blechinger's responsibility to keep track of such things. On the other hand, Fliehr was in training, and it is undisputed that such agents are to be monitored more closely than their experienced counterparts. Moreover, all evidence indicates that Blechinger is an attentive supervisor. The inescapable conclusion is that, regardless of how DOC came to view the event after Nitek shot a law enforcement officer, Fliehr's response to Blechinger's directive had not been considered negligent under normally applied performance standards.

Further troubling is DOC's decision to focus its investigation and resulting discipline exclusively on Fliehr. In her investigatory interview, Blechinger made the following, concluding statement:

This is a sad situation and we look at Evidenced Bases processes and working on skill deficits and what we need to look at, what to do not to reoffend, and the offenders make the change. How do you predict someone will snap and I ask myself, how do agents and sups make decisions? (crying) Every day we let people out, repeated alcohol offenses, how do we know they will not kill someone in OWI? I look back at not knowing he was the driver. I

would have made the same decision. The discrepancies, the fishing and in Green Bay, we should have followed up with that. As a sup, what should I have done to have the agents follow up? I go to the office and it appears Mike is doing a good job. What does a Medium mean, I don't know any more. You can have a low level do this also. I guess I question my process this day forward. I make a decision on what they tell me. Do I wait on each one until I get a police report? Do I read everyone? I am second guessing myself on each staffing now. I had no indication this guy would do what he did. I truly believe it could have been any community member, based on his state of mind. I am assuming he was under influence of meth and alcohol and had the paranoia. What do we do with meth addicts?

This statement shows Blechinger not pointing a finger at Fliehr, but rather questioning the methodology for managing offenders and the depths to which offenders will go. She also questions her own tactics as a supervisor and takes some level of responsibility for what occurred—she says, “*we* should have followed up” (emphasis added)—yet the record contains no indication that Blechinger ever was disciplined or even investigated for the alleged shortcomings related to Nitek.<sup>1</sup>

Given all of the foregoing, the Commission rejects the suspension.

Signed at the City of Madison, Wisconsin, this 3rd day of November, 2017.

## **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

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<sup>1</sup> Neither of these observations is intended to suggest that Blechinger should have been disciplined but only to indicate that DOC has not acted consistently.