

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NILLA HARNISCH, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0230

Case Type: PA

DECISION NO. 37315

Appearances:

Sean Daley, Field Representative, AFSCME Wisconsin Council 32, Post Office Box 19, Ashippun, Wisconsin, appearing on behalf of Nilla Harnisch.

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 December 21, 2017, Nilla Harnisch filed a timely appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting she had been suspended without just cause by the State of Wisconsin Department of Corrections. The Commission assigned Raleigh Jones to serve as Hearing Examiner. A hearing was held on January 30, 2018, in Black River Falls, Wisconsin, and the parties made oral arguments at the conclusion of the hearing.

On February 22, 2018, Examiner Jones issued a Proposed Decision and Order affirming the three-day suspension. Objections were filed on February 27, 2018, and the State did not file a response. The matter became ripe for Commission action on March 6, 2018.

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, among other things, operates correctional facilities.

2. At the time of the incident that led to her discipline, Nilla Harnisch was employed as a teacher at the St. Croix Correctional Center.

3. On July 7, 2017, while teaching in her classroom, Harnisch responded to a student who used the word “wetbacks” and attempted to correct/educate her class in response to this outburst.

4. DOC suspended Harnisch for three days for doing that.

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 Nilla Harnisch 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 three-day suspension is rejected and the grievant shall be made whole.

Signed at the City of Madison, Wisconsin, this 9th day of March, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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.

Nilla Harnisch had permanent status in class at the time of her suspension and her appeal alleges that the suspension was not based on just cause.

The State has the burden of proof to establish that Harnisch 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).

Harnisch is a teacher. Teachers are expected to use appropriate language in the classroom. DOC disciplined Harnisch for something she said in the classroom on July 7, 2017. Specifically, she used the word “wetbacks” several times.

The record of the events from that day are provided by the journal entry of an inmate and the testimony of that same inmate and one other.¹ Inmate Wiehart wrote in his journal that day that Harnisch had used the word “wetback” in class and that such usage made him uncomfortable due to his ancestry being 50 percent Mexican. However, Wiehart testified at the hearing that it was possible someone else had used this term first, that he didn’t really remember the specifics of that day, and that his journal entry was made because he had to put something in for his daily entry. Inmate Chmielewski testified that someone else in the class had used this term, at which point Harnisch stated the term was inappropriate and began a discussion in class relating to why the term was inappropriate and shouldn’t be used.

Harnisch is being disciplined for, in part, violation of the Wisconsin Department of Corrections Executive Directive #5, Section VI (B), which states:

... all employees are responsible for all of the following:

1. Refrain from discriminating, harassing, hazing, bullying or retaliating conduct or actions.

¹ A consultation with Examiner Jones regarding witness demeanor took place on March 7, 2018.

2. Act as a role model and setting a professional and positive example in terms of language and behavior.
3. Create and maintaining a work environment free of discrimination, harassment, bullying, hazing, or retaliation.
4. Treat staff fairly and equally, without regard to an individual's membership in one or more protected classes.

Section III defines harassment as:

“Harassment” means unwelcome conduct when enduring the offensive conduct becomes a condition of continued employment or when the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive.

And discrimination as:

“Discrimination” means an action or behavior taken against an individual that results in an inappropriate limitation of employment opportunities, terms or conditions of employment, access to facilities or participation in programs and activities and is based upon the individual's membership in one or more protected classes. Discrimination includes the application of a rule, policy or procedure which is neutral on its face but which has an adverse effect or disparate impact on a person because of his or her protected class.

DOC failed to meet its burden in establishing that the use of “wetbacks” was done in a way which conforms to their definitions for either harassment or discrimination. The class Harnisch taught had six students. DOC only called a single witness present at the incident, Inmate Wiehart. Wiehart's testimony was unsure, contradictory, and failed to establish the behavior alleged. Additionally, Harnisch called another witness, Inmate Chmielewski, who established that Harnisch was reacting to another inmate's use of the word in question and attempted to pivot the situation into a teachable moment.

The Commission is left only to consider the case on DOC's argument made in closing that “using a racial slur is never appropriate.” That statement does not conform to DOC's own internal definitions which imply context and allow DOC some role in making a determination of such.

DOC Executive Directive #5, Section V, states:

The Department acknowledges in some situations conduct may not be offensive between particular individuals: nonetheless, the Department may regard such conduct as a violation of this policy.

DOC offered a scenario and relied on a fact pattern that they failed to meet the burden of establishing. As Harnisch argues persuasively, context matters and we have so held before. *See Knox v. DOC*, Dec. No. 37291 (WERC, 1/2018). In this instance, the grievant used a classroom setting for its intended purpose: to teach. When an opportunity presented itself to right an ignorance, the opportunity was correctly seized and as such lacks any sort of context that would be persuasive to support just cause for sustaining the discipline imposed.

Harnisch shall have the discipline struck from her record and be made whole in all other matters consistent with this opinion.

Signed at the City of Madison, Wisconsin, this 9th day of March, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman