

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EREKA CASTILLO, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0256

Case Type: PA

DECISION NO. 37487

Appearances:

Maxwell Livingston, Attorney, 200 S. Executive Drive, Suite 101, Brookfield, Wisconsin, appearing on behalf of Erika Castillo.

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

DECISION AND ORDER

On July 2, 2018, Erika Castillo filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on August 6, 2018, in Madison, Wisconsin, and the parties made oral argument at the hearing's conclusion.

On September 7, 2018, Examiner Raleigh Jones issued a Proposed Decision and Order affirming the State of Wisconsin Department of Corrections' discharge of Erika Castillo. No objections were filed and the matter became ripe for Commission consideration on September 13, 2018.

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

FINDINGS OF FACT

1. Erika Castillo was employed as a probation and parole agent with the Division of Community Corrections in the Wisconsin Department of Corrections (DOC). She was a 26-year DOC employee with permanent status in class when she was discharged.

2. On January 28, 2018, after consuming alcohol, Castillo was driving her personal car when she was stopped by a deputy sheriff for erratic driving. The deputy subsequently arrested Castillo and charged her with operating a vehicle while under the influence (OWI), first offense.

3. During her interactions with the deputy, Castillo repeatedly told the deputy she was a probation and parole agent with the State and asked the deputy to let her go (rather than arrest her for an OWI).

4 Castillo made these statements to the deputy to influence the deputy's actions and receive special treatment.

5. Castillo subsequently pled guilty to the OWI, first offense.

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 discharge Ereka Castillo.

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

ORDER

The discharge of Ereka Castillo by the State of Wisconsin Department of Corrections is affirmed.

Signed at the City of Madison, Wisconsin, this 19th day of September, 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.

Ereka Castillo had permanent status in class at the time of her discharge and her appeal alleges that the discharge was not based on just cause.

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

Castillo, a 26-year employee of DOC, was a probation and parole agent. Prior to the matter involved herein, she had a clean work record with no discipline.

On the evening of January 27, 2018 – while she was off duty – Castillo consumed alcohol at a bar with her boyfriend between the hours of 8:00 p.m. to 2:00 a.m. During that timeframe, the two had a fight. Castillo then walked home from the bar. After she arrived at home, Castillo got into her personal car and drove by herself from Burlington to Franklin where she waited for her boyfriend in his driveway. When he did not return, she drove back to Burlington by herself. At 5:15 a.m. (on January 28, 2018), Racine County Deputy Sheriff Karen Hernandez was on duty in her squad car when she observed a car drive off a divided State highway in Burlington into the median and then drive back onto the road three times. Hernandez – who was wearing a body camera – subsequently stopped the driver of the car for erratic driving. As Hernandez walked up to Castillo's car, she observed Castillo putting a badge around her neck. Castillo then spoke first and gave the deputy the badge that was around her neck. The badge in question was an identification badge that had been issued to Castillo by Milwaukee County. The badge that Castillo gave Hernandez had a sheriff's office star on it. Castillo then told the deputy that she worked at the (Milwaukee) House of Corrections. Then, Castillo repeatedly told Hernandez that she was a probation and parole agent with the State. Castillo also told Hernandez that an arrest (for an OWI) would adversely affect and ruin her career. Additionally, Castillo told the deputy she would lose her job. Castillo also asked the deputy twice to let her go (rather than arresting her). Hernandez construed all of these acts and statements by Castillo as attempts to receive special treatment and to let her go without being arrested. After Hernandez smelled alcohol coming from Castillo, she had Castillo perform three field sobriety tests. Castillo failed all three. The deputy then had Castillo use a breathalyzer and she blew a .116. Hernandez then arrested Castillo for OWI, first offense, and transported Castillo to a local hospital where her blood was drawn; the result came back at .102.

The next day – January 29, 2018 – Castillo complied with DOC Executive Directive 42 and told her supervisor about her police contact the previous day. That information was passed through channels and DOC commenced an investigation into same.

While DOC's investigation was ongoing, Castillo continued to work at DOC as a probation and parole agent until early April 2018. Then, the following events occurred.

On April 4, 2018, Castillo pled guilty to an OWI, first offense. Because of that conviction, her driver's license was revoked for six months. At that point, she could no longer drive a State car (which is a requirement for being a probation and parole agent). DOC Administrator Stephanie Hove then placed Castillo on administrative leave without pay because she had not transferred into a position that did not require her to drive a State vehicle. Castillo then got an occupational driver's license and requested that the State Fleet reinstate her driving privileges. In mid-April 2018, Castillo was granted an exemption to the DOC's driver's license policy (which meant she could drive a State car again). At that point, Hove sent Castillo a letter that removed Castillo from administrative leave without pay. Castillo returned to work on April 18, 2018.

Castillo then worked for DOC as a probation and parole agent until May 7, 2018. On that date, Castillo was notified that she was discharged for her OWI on January 28, 2018, and her statements to the arresting officer.

* * *

Before the Commission addresses Castillo's OWI and her statements to the arresting officer, the following preliminary comments are made to provide some overall context.

First, most disciplinary appeals that the Commission reviews involve misconduct at work. That is not the situation here. The discipline imposed here was for off-duty misconduct. Castillo was not coming from work or going to work when this incident happened. Normally, when an employee is disciplined for off-duty misconduct, the Commission has to address whether there is a nexus between that conduct, the employee's position, and the employer's legitimate business interests. In this case though, the Commission does not have to do that because Castillo implicitly concedes the point.

Second, it is a given that probation and parole agents are supposed to comply with the laws of the State of Wisconsin while they are on and off duty and set an example for the offenders they serve. Lest there be any question about it, it is noted that DOC Executive Directive 42 states that DOC has expectations regarding employee conduct both on and off duty, that violation of certain laws and criminal statutes may impact employees' ability to carry out their duties and responsibilities, that if an employee has any non-work related police contact – with certain exceptions not relevant here – they are to notify their supervisor regarding same, and that an employee charged with or convicted of an offense occurring on or off duty may be subject to discipline for the conduct which gave rise to the charge or conviction.

DOC's discharge letter faults Castillo for two things: her OWI arrest and the statements she made to the arresting officer.

As to the first matter, there is no question that Castillo operated a vehicle on the night in question in an intoxicated state. That was conclusively established when she initially blew a .116 in a breathalyzer, and later when her blood was drawn with a result of .102.

The second charge against Castillo involves the statements she made to the arresting officer that night.

All of Castillo's statements to Hernandez were recorded by the deputy's body camera. Given the existence of that audio and video – which was played in its entirety during the hearing – there is no question about what Castillo said to Hernandez. In this case, the statements attributed to Castillo are not just “alleged” statements. Instead, they were all proven to have been made by Castillo.

Before the deputy could say a word, Castillo spoke first and gave Hernandez the badge she had just put around her neck. It was an identification badge that had been issued to Castillo by the Milwaukee County sheriff's office. The badge had a sheriff's office star on it. Castillo said she worked at the (Milwaukee) House of Corrections. Then, Castillo repeatedly told Hernandez that she was a probation and parole agent with the State. Castillo also told the deputy that an arrest (for OWI) would adversely affect and ruin her career. Additionally, Castillo told Hernandez that she would lose her job. Castillo also asked Hernandez twice to let her go (rather than arrest her). Castillo made these statements to the deputy when she was sitting in her car, when she was outside the car doing field sobriety tests, when she was sitting in the back seat of the squad car, and when she was at the hospital having her blood drawn. The Commission has no trouble concluding – just as Hernandez did – that all of these acts and statements were aimed at convincing Hernandez to let her go as a professional courtesy. Additionally, there were attempts by Castillo to make Hernandez feel guilty so she would not arrest her.

In the Commission's view, these statements are far more serious and damaging to Castillo than the OWI itself. From the moment that Castillo showed her identification badge, the very nature of the traffic stop changed. The driver went from being a citizen driver that had been pulled over for erratic driving to someone who was seeking to influence the deputy's actions and receive special treatment because of her position as a probation and parole agent with State. It was apparent that Castillo tried to use her DOC position to avoid getting arrested. It does not matter that she was not successful. It is indefensible and simply not supposed to happen.

The Commission understands that Castillo made all these statements while she was drunk. Building on that, the Commission is also aware that drunk people make outrageous statements. However, being drunk does not excuse individuals from their bad acts. Thus, Castillo can be held responsible for what she said to Hernandez notwithstanding her intoxication. Castillo is responsible and accountable for what she said in her intoxicated state.

Based on the above, the Commission finds that DOC had just cause to discipline Castillo for that off-duty misconduct.

The focus now turns to the level of discipline imposed here (i.e. discharge).

When the Commission has overturned employee discipline, a common reason for that occurring is that a charge made against the employee was not substantiated. Here, though, both charges against Castillo were substantiated so the Commission lacks that basis for overturning the discharge.

Notwithstanding that fact, Castillo argues that the discharge should still be overturned for any of the following reasons.

First, Castillo argues that DOC should be equitably estopped from imposing any discipline at all on her because she was placed on unpaid leave beginning April 3 and was subsequently allowed to return to work on April 17, 2018. According to Castillo, when Hove directed her to return to work on April 17, 2018, that meant that DOC had decided no discipline was going to be imposed on Castillo for her actions on January 28, 2018. The Commission could accept that premise if either of Hove's letters had specifically said that DOC was not issuing any discipline to Castillo for her actions on January 28, 2018. However, neither letter said that. The first letter dated April 3, 2018 put Castillo on unpaid leave and then said in pertinent part: "The reason for this action is due to your failure to transfer into a position that does not require you to drive a state vehicle." Similarly, DOC's letter dated April 17, 2018 – which allowed her to return to work – said in pertinent part: "You were placed on administrative leave with (sic) pay due to your failure to transfer into a position that does not require you to drive a state vehicle." Thus, both letters dealt with Castillo's ability to drive a State vehicle. Castillo's ability to drive a State vehicle is a completely separate matter from the level of discipline which DOC planned to impose on Castillo for her actions on January 28, 2018. The Commission's reading of those two letters is that neither one addressed that matter (i.e. the level of discipline which DOC planned to impose on Castillo for her actions on January 28, 2018). The Commission concludes that neither of DOC's letters dated April 3 or 17, 2018 equitably estopped DOC from subsequently taking disciplinary action against Castillo for her actions on January 28, 2018. Neither of DOC's letters dated April 3 and 17, 2018 somehow waived DOC's ability to later impose disciplinary action on Castillo for her actions on January 28, 2018.

Second, Castillo faults DOC for not following progressive discipline. It is noted at the outset that the normal progressive disciplinary sequence for State employees is to receive a suspension prior to discharge. That did not happen here. Instead, DOC decided to discharge Castillo for her conduct on January 28, 2018.

An employer does not have to follow the normal progressive disciplinary sequence in every circumstance. One common exception occurs when serious misconduct is involved. In this case, the parties dispute the seriousness of Castillo's actions on January 28, 2018. According to Castillo, her actions that night did not warrant discharge. DOC disagrees.

The Commission concludes that Castillo's actions on the night in question can indeed be characterized as serious misconduct. It would be a separate question if Castillo's misconduct that night was limited to just an off duty first offense OWI. Castillo attempted – via her numerous statements – to use her position as a probation and parole agent to receive special treatment and let her go without being arrested.

DOC decided to characterize Castillo's actions on the night in question as serious misconduct within the meaning of DOC Executive Directive No. 43 (Work Rules). Therein, it says that the employer does not need to impose progressive discipline for certain acts of serious misconduct. Specifically, DOC charged Castillo with violating Item No. 7, which covers "[a] conviction of an employee of a crime or other offense subject to civil forfeiture, while on or off duty, if the conviction makes it impossible for the employee to perform the duties that the employee performs for the agency." It is DOC's view that Castillo's OWI conviction and her attempts to influence Hernandez undermined the credibility of her position and damaged her relationship with law enforcement. Based on this, the Commission is hard pressed to disagree. DOC also charged Castillo with violating Item No. 9, which covers "[a] serious violation of the code of ethics established by the director under s. 19.45(11)(a), as determined by the director." The State code of ethics says that State employees are not supposed to use their State position to seek or obtain a benefit, advantage, or privilege. While Castillo did not ultimately get a benefit, advantage, or privilege from Hernandez, it was not for lack of trying. Castillo certainly sought to influence the deputy that night to let her off and not arrest her for an OWI. It is DOC's view that Castillo's actions that night constituted a serious violation of the code of ethics. To support that premise, DOC avers that it was aware of just one other case where a DOC probation and parole agent was stopped for an OWI, and the employee tried to get out of the OWI charge by identifying themselves as a DOC employee and seeking special treatment. In that case – which also occurred in 2018 – termination charges were brought against the employee (Ruiz), but she resigned before she could be discharged. DOC posits that that case shows it has taken a hard line in situations – like this one – where an employee tried to get out of an OWI by identifying themselves as a DOC employee and seeking special treatment.

Next, Castillo argues that the discipline imposed on her should be limited to a suspension. After DOC completed its investigation, DOC Employment Relations Specialist Emily Stenhoff reviewed it and wrote a memo wherein she recommended that Castillo receive a one-day suspension for her actions on January 28, 2018. Later, Stenhoff sent an email that said Castillo's case "has been approved for a one-day suspension." Not surprisingly, Castillo relies on Stenhoff's memo and email for the proposition that her discipline should be limited to a one-day suspension. The Commission finds otherwise. It would be one thing if DOC had initially given Castillo a one-day suspension, and then later turned around and discharged her for the same offense. However that is not what happened. Notwithstanding that Stenhoff wrote in an email that a one-day suspension had been approved for Castillo, that was not the discipline that was issued to Castillo. The only discipline that DOC issued to Castillo was discharge. Even if Stenhoff's recommendation for discipline is the end of DOC's disciplinary decision-making process in some cases, it was not here. In this case, Stenhoff's recommendation for a one-day suspension was not adopted by her superiors. Close to a half dozen DOC and Division of Personnel Management (DPM) administrators considered what they thought Castillo's discipline should be. As an example, Hove (who had signed both letters to Castillo dealing with her leave of absence) favored a three-day suspension for Castillo. That view was supported by other DOC administrators. Their recommendation for a three-day suspension – which differed from Stenhoff's recommendation of a one-day suspension – then went to DPM Deputy Administrator Stacey Royston. While Castillo objects to Royston's involvement in her case, the record shows that Royston reviews State disciplinary cases which involve serious acts of misconduct. Royston turned out to be the ultimate decision-maker in this case. She concluded that Castillo's actions on January 28, 2018 constituted serious misconduct which warranted discharge. In reaching this conclusion, Royston reviewed the same set of facts that the DOC administrators had reviewed, but came to a different conclusion

than they did (i.e. she concluded that discharge was warranted). Royston is empowered to do that. What Castillo essentially wants to do here is pick which State administrator gets to impose her discipline (i.e. Stenhoff rather than Royston). She does not get to do that. The Employer gets to make that call.

Finally, Castillo contends that her discharge should be overturned because a coworker was allegedly treated more favorably than she was. An employee who raises a disparate treatment claim has the burden of proving that contention.

The Commission has long recognized that disparities in discipline may, under certain circumstances, affirmatively defend against discipline despite the existence of misconduct. Underlying that position is the notion that if an employer treats one employee significantly more harshly than a similarly situated coworker for similar misconduct, inherent unfairness exists.

The record shows that in the last few years, there have been three DOC employees (besides Castillo) who were stopped for OWIs. The first case involved a corrections officer whose last name was Richardson. Although he was charged with an OWI, he was not convicted of same. Additionally, when he was stopped by the police, he did not identify himself as a DOC employee or ask the officer for special treatment. Richardson received a suspension, but the record does not identify its length. The second case involved Glynn. She is a probation and parole agent who worked with Castillo. In 2017, Glynn was charged and convicted of an OWI, first offense. When she was stopped by police, Glynn did not identify herself as a DOC employee or ask the officer for special treatment. Glynn received a one-day suspension. The third case – which has already been noted – involved probation and parole agent Ruiz. When Ruiz was stopped by police for an OWI, she identified herself as a DOC employee and asked the officer for special treatment. As previously noted, DOC attempted to discharge Ruiz, but she resigned her employment before that could happen. Not surprisingly, of these three cases, Castillo relies on the Glynn case and argues it shows disparate treatment. The problem with this claim is that the facts in the Glynn case are different in one very fundamental respect from the facts in Castillo's case. In Glynn's case, she did not identify herself to the arresting officer as a DOC employee or ask the officer for special treatment. That of course is what Castillo did, and the Commission previously found that was the most egregious of Castillo's misconduct. While Glynn received a one-day suspension for her misconduct, there was a logical and reasonable explanation for that (namely, that Glynn did not commit the same misconduct Castillo did). Castillo's misconduct was far more egregious than Glynn's, and in fact mirrors Ruiz's misconduct. Given the foregoing, the Commission finds that the claimed disparate treatment was not proven.

Having addressed the various defenses offered by Castillo and found them unpersuasive, it is held that the discipline imposed by DOC on Castillo was not excessive.

In light of the above, the Commission concludes that DOC had just cause to discharge Castillo.

Signed at the City of Madison, Wisconsin, this 19th day of September, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman