STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEVIN M. KELSAY, Appellant,

vs.

WISCONSIN STATE PUBLIC DEFENDERS OFFICE, Respondent.

Case ID: 501.0003
Case Type: PA

DECISION NO. 37929

Appearances:

Kevin Kelsay, 5435 West Forest Home Avenue #3, Milwaukee, Wisconsin, appearing on his own behalf.

Cara Larson, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the Wisconsin State Public Defenders Office.

DECISION AND ORDER

On December 26, 2018, Kevin M. Kelsay filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause by the Wisconsin State Public Defenders Office. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on February 19, 2019, in Milwaukee, Wisconsin, and on February 27, 2019, in Madison, Wisconsin. The parties made oral argument at the conclusion of the hearing. A transcript of the hearing was received on March 21, 2019. The Appellant filed a post hearing brief on March 24, 2019.

On April 2, 2019, Examiner Raleigh Jones issued a Proposed Decision and Order affirming the one-day suspension issued to Kevin M. Kelsay by the Wisconsin State Public Defenders Office. Kelsay filed an objection on April 6, 2019. The State did not file a response and the matter became ripe for Commission consideration on April 12, 2019.

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

FINDINGS OF FACT

1. Kevin M. Kelsay is employed by the Wisconsin State Public Defenders Office as a Legal Secretary and had permanent status in class when he was suspended.

2. The Wisconsin State Public Defenders Office (SPD) is a State agency.

3. On October 8, 2018, Kelsay sent a three-page letter to the SPD's Affirmative Action Officer and six other department supervisors captioned "Cease and Desist."

4. The letter contained some inaccurate statements about an SPD supervisor.

5. SPD suspended Kelsay for one day for the inaccurate statements contained in that letter.

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 over this appeal pursuant to § 230.44 (1)(c), Stats.

2. The Wisconsin State Public Defenders Office had just cause within the meaning of § 230.34(1)(a), Stats., to suspend Kevin M. Kelsay 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 one-day suspension of Kevin M. Kelsay by the Wisconsin State Public Defenders Office is affirmed.

Dated at Madison, Wisconsin, this 24th day of April, 2019.

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.

Kevin M. Kelsay had permanent status in class at the time of his one-day suspension and his appeal alleges that the suspension was not based on just cause.

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

For the last several years, Kelsay's working relationship with his supervisors has been combative and contentious. On October 8, 2018, Kelsay sent a three-page letter to the SPD's Affirmative Action Officer and six other department supervisors captioned "Cease and Desist." In that letter, Kelsay demanded that management "cease and desist" from its ongoing "campaign to punish" him for asserting his rights and retaliating against him. That letter provided thus:

> Re: *Cease and Desist*
>
> Dear Ms. Fisher:
>
> As you are aware, I am a disabled individual. My well documented conditions previously reported to my employer include: (1) atrial fibrillation, a heart condition; (2) lower back pain due to abnormal bone growth in my back; (3) fractured pelvis and hip (January, 2018); and (4) diabetes. I have respectfully requested that the agency reasonably accommodate these conditions in my employment setting. The agency has wholly failed to do so, resulting in my filing a complaint against the agency with the United States Equal Employment Opportunity Commission which has resulted in their issuance of a "Right to Sue" letter a copy of which was recently received by your HR Director, Nancy McLean.

Since I initially exerted my rights in the still-pending, unresolved matter before the WERC, the agency has retaliated against me on several occasions. It continues to do so as recently as this past Friday. There seems to be no end in sight. Therefore, I am issuing this *Cease and Desist* letter both insisting that the discrimination under the Americans with Disabilities Act cease and that your agents and employees discontinue in their practice of refusing to reasonably accommodate me and continuing to retaliate against me.

As you are aware, this agency took the position before the WERC that I had constructively waived my right to an expedited processing of the grievance then before the WERC, in violation of Wisconsin Statutes 230.445, by becoming disabled. The 120-day deadline applicable to such appeals ran on April 10, 2018. The agency was afforded the opportunity on multiple occasions by the WERC to withdraw its resistance to my appeal of that matter and declined to do so, arguing that by becoming disabled I had waived my rights to an expedited processing of my appeal (within 120 days from December 11, 2017, when it was filed). The agency's position is in violation of Wisconsin Statutes 230.445, and both state and federal laws relating to discrimination against disabled individuals.

On April 4, 2018, within the 120-day deadline and in conjunction with my return to work and insistence that the WERC conclude the matter, the WERC adopted the SPD's position as espoused by their attorneys from the Department of Administration:

> At this juncture, I will only note that Mr. Kelsay's misfortune as to his health has made the 120 deadline impossible to meet. Once Ms. Larson files her response to the pending discovery motion, we will proceed promptly. Peter Davis, WERC

A hearing was eventually held, and yet as of this writing Mr. Davis has still not issued any recommendations to the WERC on whether to uphold my grievance, and the WERC therefore has not acted. It is now day 301 with no end in sight. The violations of my right to an expedited processing of my appeal have gone from the sublime to the absurd.

The agency has continued to retaliate against me and violated my rights. On August 21, 2018, on the heels of the failure of the Milwaukee Trial administration to appoint private counsel due to the agency's conflict of interest since I was the VICTIM of the

armed robbery of the gentleman whose case was appointed to Francisco Araiza over my objection to the ethical propriety of same, Paige Styler decided to retaliate against my assertion of rights under the Americans with Disabilities Act ("ADA') by taking it upon herself to violate my personal safety, privacy and other rights by engaging in a conspiracy with the head of the security of the State Office Building and a Sergeant of the Milwaukee Sheriff's Department Civil Process division by attempting to effect service of process of some paperwork related to an Arkansas lawsuit. In doing so, she directed the head of building security and armed plain clothes deputy to the 8th floor Men's Room and in the ultimate act of violation of a person's privacy rights, had the building security head come into the Men's Room and CONFIRM MY IDENTITY IN THE BATHROOM STALL where I was using the bathroom and pass that information on to the armed plain clothes deputy who lingered – unaccompanied by building security – outside the men's room waiting to serve me papers. Only he failed to do so, resulting in Ms. Styler's decision to take the paperwork from him and personally serve me herself in full view of my co-workers back on the 9th floor and outside the presence of the deputy. Then the three of them conspired to file a false Affidavit of Service with the Arkansas court in which. they claim that the deputy served me, a fact that they knew to be false, and one for which an Abuse of Process claim will likely be made. The ethical implications of Ms. Styler's behavior in participating in a perpetration of a fraud upon the courts will be something she can resolve with the lawyer regulatory agency whose rules prohibit attorneys from committing fraud in general, and in particular failing to exhibit candor to a tribunal. Her conduct on that date, being retaliatory in nature, was unconscionable and will not stand. And before there are any false denials of involvement, please be aware that I have received two separate disks from the Department of Administration under the Open Records Law containing the available video of the incident, which clearly implicates Ms. Styler's conduct as described above. And let's not forget she served me in the full view of my co-workers. Yet, the affidavit does not indicate that the process server left the paperwork with my co-worker and that she is the one who actually served me. That is a False Swearing for which the deputy will have to answer to his own agency's Internal Affairs division.

Most recently, just last week, my back was giving me fits. I nevertheless reported for work Monday, Tuesday, Wednesday and Thursday. Tuesday night was a nightmare for me, as the back locked up completely and I was up until after 4:00 a.m. with no sleep; I sent an email to Mary Cayan indicating that I would be

physically incapable of performing my work duties that day to give as much advance notice as possible for her to find coverage for my duties. In response, I was ordered to go to a clinic and get a medical excuse for missing work that day. Putting aside the impossibility of that request on Friday (I was couch and bedridden) I spent hours attempting over the weekend to accommodate that demand by going to clinics and seeking out such a "medical excuse" but thus far have been unable to be seen by anyone from Froedtert Medical College of Wisconsin. my treating physicians. I will continue in that quest, despite the unlawful nature of the demand in the first instance.

The idea that I have to on each occasion in which there are issues related to my disabling conditions miss work go to the time, trouble and expense of getting a note from my doctor to re-confirm my disabling conditions is absurd, and a violation of my rights under the ADA. I have a bad back. On occasion, it flares up. When it does, I report my inability to work and ask that reasonable accommodations be made. If hypoglycemic and unable to work, I will not go to a “clinic" and get a doctor’s slip confirming my diabetes. If I am in active atrial fibrillation and therefore at substantial risk of a stroke through over-activity, I am not going to run to a clinic and get a. note confirming my disabling condition. The situation with my back was bad enough but then on Wednesday of last week when I reported in early to accommodate some scheduled time shifts in my work hours that week, the fire alarm went off and I had to walk down to the ground floor from the 9th floor to evacuate the building, thereby severely exacerbating my condition. I nevertheless reported to work early on Thursday and worked eight hours, despite the incredible pain I was in which pain later that night became unbearable. I am confident that anyone in the Milwaukee Trial office who saw me last week will confirm that I was in considerable pain the entire week, but came into work all but Friday despite my condition.

The law requires this agency to reasonably accommodate my disabling conditions and to not retaliate against me for asserting my rights under the ADA.

I therefore respectfully demand that this agency, its management and employees immediately *cease and desist* in the continuing campaign to punish me for asserting those rights, and retaliating against me for pursuing my lawful remedies.

Very truly yours,

Kevin M. Kelsay

Kelsay was suspended for violating State Work Rule #17, making false, inaccurate, or malicious statements about another person who was employed by SPD.

Kelsay essentially contends he was disciplined for the insubordinate act of sending the letter. Notwithstanding Kelsay's contention, the Commission finds that SPD did not suspend Kelsay for the act of sending this letter to his supervisors. Thus, SPD did not discipline Kelsay for insubordination. Instead, he was disciplined because as the SPD sees it, some of the statements he made therein were inaccurate. That is an important distinction because employees certainly have the right to send letters to their employer regarding workplace issues. They can even send "cease and desist" letters to their employer. That said, employees who avail themselves of that right need to ensure that the content of their letters is accurate. If said letters contain statements that are false and inaccurate, employers can, and do, discipline employees for those inaccuracies.

As just noted, SPD contends that Kelsay made some false and inaccurate statements in his letter. Kelsay disputes that; with one exception that will be noted below, he contends all the statements in his letter are true. While much of Kelsay's letter addressed facts pertaining to his Americans with Disabilities Act (ADA) claim, that portion of the letter is not involved here. Instead, the only portion of the letter which is involved here are those statements made about Paige Styler. Styler is the Deputy Regional Attorney Manager in the Milwaukee office. She is a supervisor. SPD contends that Kelsay made some inaccurate statements about Styler.

Before the Commission addresses the statements that are allegedly false and inaccurate though, some factual context is necessary.

Kelsay is a defendant in an Arkansas lawsuit. In June 2018, the plaintiff in that matter requested the Milwaukee County Sheriff's Department serve Kelsay with some papers relating to that lawsuit. Thereafter, deputies tried six times to serve the papers on Kelsay at his residence but were unsuccessful in doing so. After that, deputies tried several times to serve the papers on Kelsay at his place of employment (i.e. the Milwaukee office of the SPD), but were also unsuccessful in doing so. Because of those numerous unsuccessful service attempts, the head of the civil process unit in the Sheriff's Department – Sergeant William Brown – was tasked with serving Kelsay with the papers. This was not a new task for Brown. He estimated he had previously served legal papers on Milwaukee County residents a thousand times.

On August 21, 2018, Brown went to the Milwaukee office of the SPD (where Kelsay works) and told the receptionist he wanted to see Kelsay to serve him some papers. The receptionist called Kelsay and asked him to come to the front desk to accept some papers, but Kelsay said he would not do so. After the receptionist relayed Kelsay's response to Brown, Brown asked to speak to a supervisor. The receptionist then went and got Paige Styler who, as previously noted, is a supervisor in the office. She is not Kelsay's supervisor though. Brown did not know Styler and vice versa. Brown told Styler his department had attempted unsuccessfully

to serve Kelsay papers related to a civil lawsuit numerous times, but Kelsay had evaded service and was being difficult. Because she was a supervisor, Styler knew that other members of the Sheriff's Department had previously attempted to serve papers on Kelsay at the office. Styler considered the presence of law enforcement officers to be a disruption in the office and she wanted the disruption to end. To effectuate that, she offered to accept the papers from Brown for Kelsay, but Brown declined to give them to her. Styler then went to get Kelsay so Brown could serve him the papers. Styler found Kelsay at the desk of a coworker and told him someone was there to serve him papers. She also told Kelsay to go "deal with it" so that the process server would leave the office. Kelsay responded he was not accepting personal service at work. Styler told Kelsay she was not ordering him to accept service, but he did have to talk to the man so the Sheriff's Department would quit coming to the SPD office. Kelsay then said he had to go to the restroom whereupon he walked away from Styler and went into a bathroom. Styler then made a phone call to the area where Brown was waiting and told Brown that Kelsay was in the 8th Floor bathroom. Brown then went and waited outside that bathroom for Kelsay to exit. At one point while he waited, Brown went into the bathroom and said something. Although Brown did not know Kelsay, there was a driver's license picture included in the paperwork Brown was attempting to serve on Kelsay (per the department's standard operating procedure). When Kelsay subsequently exited the bathroom, Brown determined – based on Kelsay's driver's license picture – that it was Kelsay. Brown, who was not wearing a uniform at the time but was in plainclothes, then identified himself as a Milwaukee County Sheriff's deputy and said he was there to serve Kelsay with legal papers. Brown then attempted to hand Kelsay the papers, but Kelsay refused to accept them. Kelsay told Brown he was not accepting any paperwork and walked away from Brown. After Kelsay walked away from him without accepting the papers, Brown did not attempt to chase after Kelsay. Instead, Brown returned to the receptionist area. While he was there, Brown completed an affidavit of service used by the department. That form document is used to certify that someone has been served legal papers. Therein, Brown identified the specific legal papers which, in Brown's view, had been served on Kelsay. Brown then gave the completed affidavit and the legal papers (that Kelsay had refused to accept) to the receptionist. Brown did not see what the receptionist did with the documents after he left. The record indicates the receptionist later gave the legal papers to Styler. Styler, in turn, hand delivered them to Kelsay.

The proposed decision by the Commission delved into the legitimacy issues surrounding the adequacy of service. While SPD's position is rooted in the argument that Kelsay was properly served by Brown, the Commission finds it is irrelevant whether the service was proper. It is unnecessary and inappropriate for the Commission to get involved in this issue, as it involves subject matter beyond our expertise, and the discipline should not be viewed in the context of the adequacy of service. Instead, the Commission will focus on the language employed by Kelsay in his communication.

Kelsay made statements specific to Styler relating to: 1) conspiring with Brown to make a "false" affidavit; 2) filing that "false" affidavit with an Arkansas court; and 3) participating in the perpetration of fraud on the court. Additionally, Kelsay indicated the head of security for the State office building entered the bathroom, where Kelsay was attempting to avoid service, in an effort to effectuate said service. There are other potential inaccuracies but for purposes of the Commission's evaluation of Kelsay's discipline these are sufficient.

There are two main areas to address in determining whether the statements made by Kelsay were false. First is the factual elements of the allegations which were made. There are several false elements in the statements made by Kelsay. The head of security of the State office building was not involved in the matter at all, contrary to the statement of Kelsay. While seeking credit for admitting this mistake during a pre-disciplinary meeting, such is not sufficient to revoke the statement for purposes of our evaluation. Kelsay's statement that Styler conspired with Brown was false. Brown alone completed the affidavit and decided what to write. Styler had nothing to do with this. The statement by Kelsay that Styler was involved in filing a "false" affidavit with the Arkansas court is also not supported factually. Again, Styler had nothing to do with this. Kelsay indicates that Styler participated in a fraud on the court. There is no evidence that Styler did in fact do this.

The second issue in determining whether the statements made by Kelsay were false is the more general nature of his letter. Kelsay chooses to use inflammatory declarations stating conclusions of law. Those are all found to be false. If Kelsay had concerns regarding the conduct of others, it may have behooved him to insert the word "potentially" into his letter at several points. Kelsay did not. The result is a letter that states in a declarative fashion that certain individuals were guilty of the various allegations made. Those individuals were not guilty of such at the moment the document was written or submitted, nor would they be until they were given the proper due process to defend themselves and their actions. Given the gravity of the declaratory statements made by Kelsay, this in turn creates a grave and material breach of truth by him.

In his objection to the proposed decision, Kelsay offers additional argument.

First, Kelsay argues he is being punished for his status as a pro se litigant who authored a cease and desist letter and states that if he could afford legal counsel he would not have been punished for his attorney sending such a letter. The Commission is not in a position to speculate as to this argument as those facts are not before us. However, it is unlikely an attorney would have sent such a letter in the form that it took. While Kelsay relies heavily on the adversarial nature of legal communications, most such letters would not be declaratory as this was. Instead, they would typically advise an employer of potential legal concerns that should be addressed in a manner consistent with the request of the cease and desist letter. Kelsay leans on his inability to hire an attorney in this regard due to personal financial constraints, but it is important to note that Kelsay in his dealings with the Commission has stated he is a former attorney with a law degree. With that background, Kelsay should have had the proper knowledge to write a letter in a way that was factually correct. Kelsay understood the words he used.

Next, Kelsay argues the Commission's findings imperil the ability of workers to adequately protect themselves in the workplace. This argument falls short. Employees are able to communicate with employers and, when the circumstances are appropriate, give legal notice for an employer to halt a particularly egregious action. A cease and desist letter has little legal authority on its own. Instead, it is meant to document that concerns were raised and communicated with another party, that they were put "on notice." That is not to be confused with making declaratory summations of law against coworkers that are inflammatory in nature, as was

the case here. If Kelsay's argument in this regard prevailed, the consequence would be a carte blanche ability for employees to fabricate any slander regardless of a foundation of truth towards others in the workplace under the guise of a legally protected vessel. That is clearly not what the law intends.

Finally, Kelsay argues he is entitled to protection because the actions of SPD were retaliatory in response to a separate matter Kelsay had before the Commission. There is no persuasive evidence as to this defense, and the record has established the discipline imposed on Kelsay was strictly related to the inaccurate and false statements made in the cease and desist letter.

Based on the above, the Commission finds Kelsay made false and inaccurate statements about another person in his cease and desist letter. That constituted workplace misconduct which, in turn, warranted discipline.

The Commission finds the level of discipline imposed here (i.e. a one-day suspension) was not an excessive punishment for same. In so finding, it is expressly noted that a one-day suspension is the first step in SPD's progressive discipline sequence. Thus, the discipline imposed was proper.

Dated at Madison, Wisconsin, this 24th day of April, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman