

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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KEVIN M. KELSAY, Appellant,

vs.

WISCONSIN STATE PUBLIC DEFENDERS OFFICE, Respondent.

Case ID: 501.0005

Case Type: PA

DECISION NO. 37958

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**Appearances:**

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

Anfin Jaw, Attorney, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the Wisconsin State Public Defenders Office.

**DECISION AND ORDER**

On May 25, 2019, Kevin M. Kelsay filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for five days without just cause by the Wisconsin State Public Defenders Office. A hearing was held on June 6, 2019, in Milwaukee, Wisconsin, by Examiner Peter G. Davis. The State made oral argument at the conclusion of the hearing. A hearing transcript was received on June 17, 2019. Kelsay filed written argument on June 24, 2019.

On June 26, 2019, Examiner Peter G. Davis issued a Proposed Decision and Order rejecting the Wisconsin State Public Defenders Office's five-day suspension of Kevin M. Kelsay. The State filed objections on June 28, 2019. Kelsay responded on June 29, 2019, and the matter became ripe for Commission consideration on July 2, 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. Kelsay was suspended by SPD for failing to timely complete an assignment, engaging in communication with another legal secretary about a legal issue related to the assignment, and failing to communicate in a productive, helpful, and supportive manner.

4. Kelsay did not fail to timely complete an assignment, engage in improper communication with another legal secretary about a legal issue related to the assignment, or fail to communicate in a productive, helpful, and supportive manner.

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 Wisconsin State Public Defenders Office did not have just cause, within the meaning of § 230.34(1)(a), Stats., to suspend Kevin M. Kelsay for five days.

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

### **ORDER**

The suspension of Kevin M. Kelsay by the of Wisconsin State Public Defenders Office is rejected and Kelsay shall be made whole.

Signed at the City of Madison, Wisconsin, this 19th day of July, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING PROPOSED 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 suspension and his appeal alleges 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).

On December 11, 2018, shortly after he personally advised Kelsay he was leaving the SPD office and employ for Las Vegas, Nevada, an attorney for whom Kelsay served as legal secretary sent Kelsay the following email at 2:41 p.m.:

Hi Kevin,

Freddie is taking over the case ... I am wondering if you don't mind doing this for us to get the transcript for the prelim to get things rolling ...

Thanks,

Puck

Kelsay saw the email for the first time on December 12, 2018, and sent the following email at 9:12 a.m. to the legal secretary for the attorney who would now be handling the case:

Good morning all! This is a form which, unfortunately, must be signed by the attorney of record, who is Fred. See attached.

Sandy, let me know if I can assist in some way. I'm sure you've done tons of these.

Kevin M. Kelsay  
Legal Secretary

Unbeknownst to Kelsay, the legal secretary was out of the office and did not see Kelsay's email until late in the afternoon of December 12, 2018. When she replied by email at 3:15 p.m. as follows she was unaware that the attorney who had made the initial request to Kelsay had left SPD's employment.

Any lawyer can sign these Kevin. I am out of the office until tomorrow. I would appreciate it if you can help me out since I will be overloaded with work tomorrow. Thank you.

Kelsay responded at 3:20 p.m. as follows:

Sorry but only the attorney of record or a supervisor can sign it; Puck is neither anymore. You will have to have your attorney sign it. If time permits, I'm happy to finish filling out the form for Fred, but Puck is gone and no longer counsel of record.

I'm buried as well, as I'm closing out Puck's practice as I type this.

But I'll see what I can do.

The legal secretary replied at 3:24 p.m. as follows:

Well whatever you can do would be appreciated. But I know for a fact that other lawyers can sign other lawyers['] motions and stuff like that so I've had other lawyer[s] sign transcripts before too. Thanks for your help.

Kelsay responded at 3:30 p.m. as follows:

Sandy, I understand your assumptions because you've been here a long time, but think it through. He is no longer a practicing attorney with this office or within the State of Wisconsin. He cannot sign anymore paperwork as such. Having one currently licensed, insured, on-staff attorney sign for another similarly situated attorney is one thing, but this would be no different than asking Alexis Luster or James Rael to sign such a request. They don't work here anymore. They don't practice law in the State of Wisconsin anymore. They have no malpractice coverage for errors of omissions anymore for acts done in Wisconsin. Neither does Puck.

I would never allow Puck to put his professional license at stake by signing documents for cases and an agency with whom he is no longer associated, anymore than I would for Alexis or James.

Just won't do it. Sorry.

But Freddy, aw hell no problem.

Finally, we've now collectively spent more time on this than it would have taken to just fill out the form ... so let's end this discussion please.

Kelsay sent the following email to the legal secretary at 4:02 p.m.:

WHO LOVES YA?!?!?

I completed the form, Freddie signed it; it's on your chair!!

THAT'S RIGHT, I DO!!

SPD's rationale for the five-day suspension is contained in the January 31, 2019 suspension letter as follows:

This is official notification of a **5 day suspension without pay** for violation of the following State of Wisconsin work rules:

(3) Disobedience, **insubordination**, inattentiveness, negligence, **failure or refusal to carry out written or verbal assignments, directions, or instructions.**

On Monday December 11, 2018 you were given direction by Attorney Puck Tsal to complete a transcript request at 2:41pm. You did not complete the request that day. On Tuesday, December 12, 2018, starting at 9:12am you had an e-mail exchange with another Legal Secretary, Sandra Stelnpas, directing her to complete the transcript request. Ms. Stelnpas explained that she was out of the office and asked for your assistance in completing your assigned task. You refused and told her that "only the attorney of record" could sign for a transcript request. She responded that other attorneys may sign for transcript requests. Again you responded, with your legal opinion, stating why you would not complete the task. You indicated that you would not "allow" Puck Tsal to put his professional license at stake by signing the documents. You wrote, "Just won't do it". At 4:02pm on December 12, 2018, you completed the task by having attorney Fred Richardson sign the transcript request form.

This refusal to carry out a directive by an attorney and the subsequent e-mail exchange violated your Letter of Expectation in the following ways:

**1. Expectation #1– When an assignment is given to you by an attorney you must complete the assignment in a timely and accurate manner. If you are unable to complete an assignment given to you because of time constraints, you must meet with your supervisor to discuss the priorities of your workload.**

- The transcript assignment was given to you at 2:41pm. This request would have taken you less than 5 minutes to complete and any attorney could have signed off on the request. Although you did complete the task eventually, you did so after a back and forth e-mail exchange with another Legal Secretary. By your own admission, you stated, “We’ve now collectively spent more time on this (email exchange) than it would have taken to just fill out the form”. Your refusal to complete this task, as assigned, in a timely manner violated the expectation. In addition, you indicated in your e-mail exchange that you were “buried” with work as a reason you would not be completing the request. As your expectation notes, you should have met with your supervisor to discuss why you would not be completing the assignment as requested. You did not do this.

**2. Expectation #4–You are not a licensed attorney. Do not do legal research unless asked specifically to do so. Do not reply to any email correspondence between attorneys or others seeking opinions or information regarding legal decisions, interpretation of statutory language, or policy affecting the adjudication of cases unless you are specifically asked to do so. Please speak directly to your supervisor if you need direction on how to apply this requirement to a specific situation before responding.**

- You are not an attorney. You responded to Ms. Stelnpas’ e-mail by writing about Attorney Tsal, “He is no longer a practicing attorney with this office or within the State of Wisconsin. He cannot sign anymore paperwork as such.” Although, Attorney Tsal was and is still a practicing attorney and could sign the transcript request, as an attorney, you are not in the position to determine the legality of who signs transcript requests. You also questioned Attorney Tsal’s request by stating “I would never allow Puck to put his professional license at stake by signing documents for cases and an agency with whom he is

no longer associated, any more than I would for Alexis or James”. Again, this is not an area in which you are ethically or professionally able to make a decision. In addition, you are incorrect in your assertion that he could not sign.

**3. Expectation #7—Your dialogue and demeanor in the workplace towards your attorneys, other employees and outside contacts must be courteous and professional. Day to day interaction with others is to be successful, productive, helpful and supportive. This includes written communications i.e.: emails, etc.**

- Your entire e-mail exchange with Ms. Stelnpas was not productive, helpful, or supportive. Ms. Stelnpas was not given the assignment of completing the transcript request, yet you directed her to complete the task you were given. You are not in a position to assign work given to you to another employee. When that employee told you she was out of the office and asked for your assistance, you gave inaccurate reasons for why you could not complete the assignment. As stated above, you eventually completed the assignment, but that was after you spent more time on the e-mail exchange with Ms. Stelnpas than it would have taken you to complete the task itself.

*Emphasis in original.*

The testimony presented at hearing paints a much more benign picture of events than the stark one portrayed in the suspension letter.

Based on the testimony and the content of the relevant emails themselves, it is evident that Kelsay never refused to perform the assignment in question but rather followed the standard office practice of asking for collegial assistance. In the end, the task was completed by Kelsay the same day he became aware of the request. Thus, it is concluded that Kelsay did not violate Expectation #1.

Based on the testimony and the content of the relevant emails themselves, it is evident that there was an understandable misunderstanding as whether the attorney departing for Las Vegas, Nevada was available to sign the document in question. This good faith misunderstanding lay at the heart of the exchange as to who was able/available to sign the document. The email exchange was fundamentally an effort to sort that misunderstanding out rather than some inappropriate discussion of legal niceties. Thus, it is concluded that Kelsay did not violate Expectation #4.

Based on the testimony and the content of the relevant emails themselves, it is evident that the email exchange was collegial and thus productive, helpful, and supportive. Thus, it is concluded that Kelsay did not violate Expectation #7.

Given the foregoing, it is concluded that Kelsay did not commit any misconduct and therefore the suspension is rejected.

Signed at the City of Madison, Wisconsin, this 19th day of July, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman