

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TIMOTHY JOCHMAN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0312

Case Type: PA

DECISION NO. 38268

Appearances:

Kenneth Tilleman and Timothy Jochman, 829 Bechaud Avenue, North Fond du Lac, Wisconsin, appeared on behalf of Timothy Jochman.

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

DECISION AND ORDER

On August 29, 2019, Timothy Jochman filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for three days without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on October 8, 2019, in Fond du Lac, Wisconsin. The parties made oral arguments at the conclusion of the hearing.

On October 29, 2019, Examiner Jones issued a Proposed Decision and Order affirming the three-day suspension by the State of Wisconsin Department of Corrections. Jochman filed objections on November 4, 2019. The State did not file a response, and the matter became ripe for Commission consideration on November 12, 2019.

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

FINDINGS OF FACT

1. Timothy Jochman is employed as a correctional sergeant by the State of Wisconsin Department of Corrections (DOC) at the Taycheedah Correctional Institution and had permanent status in class at the time he was disciplined.

2. DOC is an agency of the State of Wisconsin and operates the Taycheedah Correctional Institution in Fond du Lac, Wisconsin.

3. On April 18, 2019, an inmate's shower shoes were turned over to Jochman. He destroyed them and threw them in the trash. Jochman took those actions because he thought the shoes' owner could not be determined.

4. When Jochman took the actions just noted, the inmate's name and DOC number were written in silver Sharpie on the shoes. The shoes' owner therefore was readily identifiable.

5. DOC suspended Jochman for three days for taking the actions noted in Finding of Fact 3.

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 suspend Timothy Jochman 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 of Timothy Jochman by the State of Wisconsin Department of Corrections is affirmed.

Signed at the City of Madison, Wisconsin, this 22nd day of November, 2019.

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.

Timothy Jochman 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 Jochman 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).

Female inmates at Taycheedah do not get to possess many personal items. This case involves one of the few personal items an inmate can possess. Specifically, it involves a pair of shower shoes.

Shower shoes are black rubber thongs, also known as flip-flops. After an inmate purchases a pair of shower shoes, it is recorded on the inmate's personal property sheet. Additionally, her name and DOC inmate number are written on the side of both shoes. Since the side of the shoe is black, a silver Sharpie is used to write this information so the inmate's name and DOC inmate number can be readily seen against the black rubber background. Having the owner's name written on the side of the shoes makes them readily identifiable.

On April 18, 2019, inmate Payne put her shower shoes on the top of an empty unassigned bunk in her cell and left to go to recreation. While Payne was gone from her cell, Officer Ingersoll was making rounds and found the shower shoes just referenced. She asked the inmates nearby if the shower shoes belonged to any of them and the collective answer was no. Ingersoll then turned the shower shoes over to her crew leader, Sergeant Jochman. In doing so, she told Jochman the bunk number where she had found the shoes. Jochman then checked that bunk number on his computer and learned the bunk number in question was unassigned. Jochman said

he then checked the “inside of the strap” of the shoes for a name but did not see one.¹ At that point, Jochman decided the owner of the shoes could not be determined, so he considered the shoes to be contraband. Building on that premise, he further decided to destroy the shoes so the shoes did not later make their way back into the inmate population. To achieve that result, he took a pair of scissors and cut the strap on each shoe. This made each shoe useless. Then he threw the destroyed shoes into a nearby trashcan.

When Jochman did this, some inmates in the area saw his actions. They were outraged by Jochman’s destruction of an inmate’s personal property. Not surprisingly, news of the incident spread quickly among the inmates. That, in turn, created what is called in prison parlance, a “climate issue.”

After Payne returned to her cell, she discovered her shower shoes were missing. When she asked her fellow inmates where they were, she was told that Ingersoll had taken them and that Jochman had destroyed them. Upon hearing the latter news, Payne burst into tears.

Payne subsequently confronted Jochman about her missing shower shoes. By her own admission, she was very upset with Jochman when she did so.² Payne showed Jochman a receipt she had in her possession which proved she had purchased shower shoes. She also told Jochman her name was written on the side of the shoes. When told that, Jochman responded he did not see her name on them. Payne then asked Jochman to get her shoes out of the trash, but he responded in the negative. Jochman then apologized to Payne for destroying her shoes, but Payne rebuffed his apology because she thought Jochman was smirking when he said it.

Payne subsequently called a family member outside of the prison and told her what had happened to her shower shoes. That family member then called Taycheedah and told the deputy warden what Payne had told her happened to her shower shoes.

After getting that phone call, the deputy warden tasked Lieutenant McGaw with looking into the matter. McGaw first talked with Ingersoll who told him what had happened to inmate Payne’s shower shoes. McGaw then talked to Payne who gave him her side of the story. McGaw then talked to Jochman and got his side of the story. Afterwards, McGaw had Jochman retrieve the shower shoes from the trash. When McGaw looked at the shower shoes, he saw Payne’s name on the side. McGaw then said to Jochman: “How do you miss that, both shoes have her name and DOC number on them,” to which Jochman replied he “just overlooked it.” McGaw then directed Jochman to complete an incident report about the matter, which he did.

DOC subsequently suspended Jochman for three days for destroying Payne’s shower shoes.

¹ Jochman’s claim of checking the shoes proof of ownership, and subsequent claims of thoroughness, is directly rebutted by his own statements given during the investigation of this incident. When asked if he checked the shoes for a name, Jochman responded “I didn’t...,” R. Ex.12, p.20. When asked whether he should have checked the sandals for a name and prisoner identification number, Jochman responded “Absolutely not.” *Id.* p.21.

²Jochman argues Payne was upset about other personal matters, however, the record demonstrates the incident in question was the primary source of Payne’s duress.

* * *

It is noted at the outset that while the parties approached this case as a contraband case, the Commission has decided to analyze it differently. In a prison, contraband involves something an inmate is either not supposed to have or is outright prohibited. In this case, the shower shoes are referred to as contraband. While there might be situations where shower shoes could be considered contraband when an inmate was not permitted to have them, the inmate involved here was specifically permitted to have them and DOC was aware of her possession of same. Under these circumstances, we simply do not consider the shower shoes to be contraband. Building on that premise, we need not address the parties' various arguments about how contraband is supposed to be dealt with and accounted for, and how it is actually dealt with and accounted for at Taycheedah.³

Instead, the Commission is simply going to review Jochman's involvement in the shower shoes incident and decide whether he committed misconduct. Based on the following rationale, the Commission finds he did.

We begin our discussion by first reviewing what Jochman did. After Ingersoll found the shoes in question, she turned them over to Jochman. He then cut the straps on them which made them useless and threw them in the trash.

Having just noted what Jochman did, the focus now turns to why he did that. According to Jochman, he did it because he thought the shoes' owner could not be determined. Building on that premise, Jochman concluded that made the shower shoes contraband which, in turn, he decided to destroy. Jochman said the reason he destroyed the shoes was to prevent another inmate from using them. He felt that if he had not destroyed the shoes, they would have ended up going to another inmate.

Jochman contends that before he decided the shoes' owner could not be determined, he took the following steps that he wants credit for.

First, Jochman notes he checked on his computer to see who occupied the bunk where Ingersoll had found the shoes and in doing so learned the bunk was unassigned (meaning it was an empty bunk). However, just because the shower shoes were found on an unassigned and empty bunk does not mean the shoes' owner could not be determined. As will be noted in the next paragraph, there was a very simple way to learn the shoes' owner.

³Jochman argues the Commission must analyze his grievance in the context of contraband due to the discipline letter issued by DOC specifying such as the grounds for discipline. Had the Commission done so, the record would seem to support the discipline that was imposed. However, the Commission instead chooses to look at the totality of the events that transpired to make a determination on whether Jochman engaged in misconduct which constituted just cause for the discipline imposed.

Second, Jochman claims he checked the “inside of the strap” on the shoes for a name, but none was there.⁴ In support of his claim, Jochman posits the light in the room when he looked at the shower shoes was “dim.” If that was the case, he could have easily taken the shoes and gone to any other place where the lighting was brighter. He did not. Aside from that, there is the fact that when McGaw later looked at the shower shoes after they had been retrieved from the trash, he had no trouble seeing the name of the inmate on the side of the shoes. He then made this telling comment to Jochman, “How do you miss that, both shoes have her name and DOC number on them.” It is also noteworthy that McGaw was able to see the name of the inmate on the side of the shoes in the same lighting Jochman described as “dim.” Finally, it is noted that the shower shoes in question are part of the record evidence. The inmate’s name and DOC number can clearly be seen on them. Thus, the shoes’ owner was readily identifiable.⁵

When mistakes happen in the workplace, fault is often assigned afterwards. That is the situation here. The Commission finds fault can fairly be assigned to Jochman for destroying the shoes as he did. There was no reason the shoes had to be destroyed at all, let alone be destroyed right then and there, when the owner’s name and DOC number were written on the side of each shoe in silver print that could be readily seen. Since that information can be seen on the side of each shoe, the Commission rejects Jochman’s assertion that he “just overlooked” the name on the side of each shoe.

In so finding, the Commission has considered Jochman’s claim that fault should be assigned to Ingersoll rather than him.⁶ We find that Ingersoll bears no responsibility for the destroyed shoes. Ingersoll’s involvement in this matter was limited to finding the shower shoes and turning them over to Jochman. Even if Ingersoll did not look on the sides of the shoes for the inmate’s name, she had no involvement in deciding to destroy the shoes or implementing that decision. It was Jochman alone who did those things. Thus, he alone bears responsibility for the destroyed shoes.

While we have focused thus far on what Jochman did, the following is also important. When Jochman cut the straps on the shoes and threw them in the trash, some inmates saw him do it. Even if Jochman did not intend for his actions to be seen by the inmates, those that saw it were outraged. Then, word spread among the inmates. It is easy to understand why. In a prison, guards exercise power and dominion over inmates. Here, Jochman decided to exercise his power and dominion by intentionally destroying the personal property of an inmate for no good reason. Not surprisingly, the inmates took umbrage with that, and it caused a so-called “climate issue” to

⁴ As discussed in footnote 1, this claim seems to be in contrast to statements made by Jochman during the investigatory interview.

⁵ Jochman makes some inferences that the sandals in question may have been altered prior to the hearing to make the identification more pronounced and points to photographs taken of them as proof of the difficulty in reading the identifiers present. While that argument fails to be persuasive, it is unnecessary to delve into due to the statements made by Jochman identified in footnote 1.

⁶ Jochman claims that at no point has he suggested Ingersoll was responsible for this incident. This statement clashes with his investigatory interview where one could reasonably conclude that was not the case.

ensue in the area.⁷ The responsibility for that can fairly be laid at Jochman's feet. But for his power trip, the "climate issue" would not have occurred.

The focus now turns to Jochman's remaining defenses.

First, Jochman notes that after the incident occurred, he received "job instructions" from two supervisors. Although it is unclear from the record what they said to him, it can reasonably be surmised the supervisors took him to the proverbial woodshed for the poor judgment he showed in this matter. As Jochman sees it, these job instructions constituted discipline so he could not later be suspended by DOC for the same underlying act. The Commission disagrees. While an employee who is taken to the proverbial woodshed by a supervisor may feel like he has been disciplined as a result of unpleasant or uncomfortable job instructions given him, in reality he has not. That is because job instructions given by a supervisor to an employee do not constitute formal discipline. Here, the only formal discipline Jochman received for this incident was a three-day suspension, notwithstanding the tongue lashing he received from his supervisors.

Second, Jochman notes the person who decided what discipline to impose on him was Warden Cooper. He claims she is biased against him because of past workplace issues. In addressing this claim, we have decided to assume for the purpose of discussion that there is indeed history between the two. Even if there is, that does not matter. That is because the employee does not get to pick the person who makes the disciplinary decision. The employer gets to make that call and decide who makes the disciplinary decision in a given situation. Here, DOC entrusted that task to Cooper. They could do that. Nothing about that decision raises any red flags.

Having addressed the various defenses proffered by Jochman and found them unpersuasive, the final question is whether a three-day suspension was excessive for this misconduct. The record shows Jochman received a one-day suspension in May, 2019, for other misconduct. Under DOC's progressive disciplinary "schedule," a three-day suspension follows a one-day suspension. Since that was the discipline imposed here, it was not excessive. Accordingly, the three-day suspension is affirmed.

Signed at the City of Madison, Wisconsin, this 22nd day of November, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

⁷ Jochman, in objecting to the proposed decision, states "There was no evidence presented in the hearing that suggested there was a "climate issue." The record shows Jochman was at the hearing, so one would presume he heard the testimony of Ingersoll and McGaw relating to these matters, therefore his allegation is a bit perplexing to the Commission.