

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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KARRIE SCHMITTINGER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0369

Case Type: PA

DECISION NO. 38475

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Appearances:

Maxwell Livingston, Attorney, 16601 W. Greenfield Avenue, New Berlin, Wisconsin, appearing on behalf of Karrie Schmittinger.

Cara Larson, Attorney, Department of Administration, 101 East 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 May 26, 2020, Karrie Schmittinger filed an appeal with the Wisconsin Employment Relations Commission asserting she 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 telephone hearing was held on July 29, 2020. The parties filed briefs on August 5, 2020.

On August 26, 2020, Examiner Jones issued a Proposed Decision and Order affirming the suspension. No objections were filed, and the matter became ripe for Commission consideration on September 1, 2020.

Being fully advised on 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 and administers the Division of Community Corrections (DCC).
2. Karrie Schmittinger (Schmittinger) is employed by DOC/DCC as a probation and parole agent and had permanent status in class at the time of her suspension.

3. Probation and parole agents employed by DOC/ DCC monitor offenders placed on court ordered supervision.

4. Schmittinger was in charge of the supervision of offender SC during the time relevant here.

5. Schmittinger failed to timely file for an extension of offender SC's discharge date, so SC discharged from supervision owing financial obligations.

6. Schmittinger subsequently supervised offender SC past his discharge date.

7. DOC suspended Schmittinger for three days for her actions in Findings 5 and 6.

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 Wis. Stat. § 230.44 (1)(c).

2. The State of Wisconsin Department of Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Karrie Schmittinger for three days.

3. Karrie Schmittinger is not a prevailing party within the meaning of Wis. Stat. § 227.485(3).

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

### **ORDER**

1. The three-day suspension of Karrie Schmittinger by the State of Wisconsin Department of Corrections is affirmed.

2. Karrie Schmittinger's motion for fees and costs is denied.

Issued at Madison, Wisconsin, this 17<sup>th</sup> day of September 2020.

**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.

Karrie Schmittinger 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 Schmittinger 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).

Probation and parole agents monitor a caseload of offenders placed on court-ordered supervision. Among other things, they are responsible for preparing accurate and timely investigations and case records.

The following department protocol is relevant to this case. The department's policies for discharging an offender from supervision are found in the department's Electronic Case Reference Manual (ECRM). That manual specifically outlines the steps that an agent needs to take before an offender is discharged from DOC supervision. It specifies that the agent will receive notice of the offender's unpaid obligations 90 days prior to the offender's discharge and the agent should attempt to collect the balance. At 60 days prior to the offender's discharge, the agent will prepare a memorandum to the court to include the court history, status of obligations and payment, relevant financial information, reason for nonpayment, and the agent's recommendation. At 30 days prior to the offender's discharge, the agent shall ensure all court obligations are paid or an extension or civil judgment has been signed by the court. That manual also specifies that once an offender is discharged from DOC supervision, there is no legal authority to continue to supervise the offender.

If a person set to be discharged from DOC supervision owes money, an agent receives notification of that fact several different ways. The first is a monthly report that all agents receive. Another way notification comes is via COMPAS, the department's workload management system. This workload manager shows the agent what they have coming up, what they have overdue, and then the due dates are broken into categories. Additionally, the record shows that department supervisor Drexler has implemented a process where agents receive

reports of what they have due or overdue two times a month. Even if agents only rely on those reports, they get them twice a month or they can pull up the reports any time on their own. Additionally, supervisor Drexler testified that she would review those reports when she met quarterly with her probation and parole agents.

Drexler had such a meeting with Schmittinger on September 23, 2019. One of the offenders they discussed in that meeting was SC, the fact that he owed money and was scheduled for discharge of supervision on November 30, 2019. They discussed extending his supervision date because of his unpaid financial obligations. To do that (i.e. extend his supervision), Schmittinger was supposed to notify the court of her extension request for SC by September 30, 2019, and if needed, follow up with the court by October 30, 2019.

Schmittinger has been a probation and parole agent for over 20 years. Because of her work experience, she knew what work needed to be done when extending an offender's supervision. Thus, the discharge process was not new to her, nor was extending an offender's supervision.

As previously noted, Schmittinger supervised offender SC and his discharge date was scheduled for November 30, 2019. On October 29, 2019, Schmittinger had SC sign a document known as an extension request/civil judgment. The obvious inference of Schmittinger having SC sign that document is that Schmittinger planned to extend SC's supervision past November 30, 2019 because of SC's unpaid court ordered financial obligations. The record shows that after Schmittinger had SC sign that document, Schmittinger was gone from work for half of the month of November on FMLA leave caring for her mother. Additionally, by Schmittinger's own admission, this document was buried on her desk with other paperwork. For those reasons, Schmittinger did not attempt to file the extension request document with the applicable court until it was very close to the deadline.

On November 26, 2019, Schmittinger prepared a written order for extension of SC's supervision. This document noted that SC was due to be discharged from probation on November 30, 2019, and Schmittinger asked the court to extend his supervision for three years, "or until his court ordered financial obligations are paid." After Schmittinger had prepared this extension request document, she gave it to her unit's office operations associate (Cooksey) and directed him to file it with the Iron County Circuit Court. November 28, 2019 was Thanksgiving Day. On November 29, 2019, Cooksey initialed and dated the extension document Schmittinger gave him. That would seem to indicate that Cooksey filed the document with the Iron County Circuit Court on that date. However, for reasons not identified in the record, Cooksey did not send that document to the court on November 29, 2019. That day, which was the Friday after Thanksgiving, often is a holiday for circuit courts and county employees. On Monday, December 2, 2019, Cooksey sent the various documents seeking an extension of probation for SC to the court via email. However, he sent it to an incorrect email address. Additionally, it turns out that the Iron County Circuit Court does not accept court documents via email. Consequently, when the Iron County Circuit Court later received Schmittinger's extension document for SC, it did not process it.

After Schmittinger gave Cooksey the extension document, Schmittinger did not follow up with the Iron County Circuit Court to verify that they had received the extension request and approved it.

The Iron County Circuit Court subsequently discharged SC from DOC supervision with unpaid court obligations effective November 30, 2019. It is unclear from the record when this happened. When the court made its ruling, Schmittinger's extension request was not on file. Thus, the court never approved Schmittinger's request that SC's supervision be extended.

Schmittinger was unaware that SC had been discharged from supervision by the court effective November 30, 2019, so she continued to supervise SC past that date. When she did so, she did not have the legal authority to supervise him past his discharge date.

On March 10, 2020, Drexler notified Schmittinger that SC had been discharged from supervision effective November 30, 2019. When she was told this, Schmittinger did not know that SC had been discharged from supervision effective November 30, 2019. Drexler then directed Schmittinger to follow up with the Iron County Circuit Court on the status of SC's extension. After she did so, Schmittinger learned that her extension request had not been timely filed with the court or granted.

On April 20, 2020, DOC suspended Schmittinger for three days. The suspension notice provided in pertinent part:

This action is based on the following facts: You supervised offender SC past his discharge date without the authority to supervise him. Offender SC discharged on 11/30/19 with unpaid court obligations with no extension request approved by the courts. You submitted an extension request/civil judgment to your unit's office operations associate on 11/29/19 for offender SC that was signed on 10/29/19. The extension request was not received by the courts until 12/2/19, past offender SC's discharge date. You did not attempt to follow up with the court to verify they had received the extension request or if it was approved until your supervisor brought it to your attention on 3/10/20. According to the Electronic Case Reference Manual for *Discharge*, the agent will receive notice of the offender's unpaid obligations 90 days prior to the offender's discharge and the agent should attempt to collect the balance. At 60 days prior to an offender's discharge the supervising agent will prepare a memorandum to the court to include the court history, status of obligations and payment, relevant financial information, reason for nonpayment, and the agent's recommendation. Thirty days prior to the offender's discharge, the agent shall ensure all court obligations are paid or any extension or civil judgment has been signed by the court. You were negligent in your duties supervising offender SC when you failed to follow ECRM timelines which resulted in offender SC being supervised past 11/30/19 without an approval for an extension.

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Schmittinger was charged with committing two infractions: 1) failing to timely file for an extension of offender SC's supervision, so SC discharged from supervision owing financial obligations; and 2) subsequently supervising offender SC past his discharge date.

Schmittinger contends at the outset that the only charge that can be reviewed herein is the first charge (i.e. her failure to timely file for an extension of SC's supervision, so SC discharged from supervision owing financial obligations), and that the second charge (i.e. subsequently supervising SC past his discharge date) cannot be reviewed by the Commission. The Commission finds otherwise. The basis for Schmittinger's claim is that when she received notice of her pre-disciplinary meeting, the only charge listed on that document was the first charge. That is true. The second charge was not listed in that document. However, what the Commission reviews in any disciplinary appeal is the final disciplinary notice issued to the employee, not the pre-disciplinary document. In this case, the disciplinary notice clearly said that Schmittinger was being disciplined for what the Employer viewed as two acts of misconduct: failure to timely file for an extension of SC's supervision, so SC discharged from supervision owing financial obligations; and subsequently supervising SC past his discharge date. We will review both those charges.

The Commission has no trouble deciding that Schmittinger committed both infractions. The following shows why. Schmittinger wanted to extend SC's supervision beyond the date of November 30, 2019. To do that, she needed to get her extension filed with the court and approved. While she prepared the paperwork to get SC's supervision extended, she was not successful in getting that paperwork filed on time with the court. Simply put, she waited too long. While the record shows that another employee in her office does the filing, it was still Schmittinger's responsibility to ensure that that happened. She should have done so and did not. Additionally, she failed to ensure that her extension request for SC was granted by the court. What Schmittinger did was assume that her extension request had been granted by the court. That assumption on her part turned out to be incorrect. A fact that makes her assumption particularly troubling is this: in her cover letter to the court on SC's extension request, she requested a fax back from the court after the request had been granted. She never received a fax back from the court. After that, the proverbial ball was back in her court and she should have followed up. Inexplicably, she did not. Once again, even though another employee in her office does the filing with the court, it was still her responsibility to ensure that the paperwork was timely filed. She should have done so and did not. Had Schmittinger not ignored the numerous reminders that were in place and filed her extension request with the court within the timelines outlined in the ECRM rather than waiting till the end of November to file her paperwork, she would have had additional time to remedy any mistake. What happened next was that for three months, Schmittinger was unaware that her extension request had not been granted. She did not learn that until March 10, 2020, when her supervisor (Drexler) brought it to her attention. What is significant about that is that Schmittinger supervised SC for more than three months past his discharge date. Doing that infringed on SC's liberty and unnecessarily subjected him to all the rules and restrictions that accompany being supervised. During that three-month time period, Schmittinger did not have the legal authority to supervise SC, yet SC remained on supervision. Simply put, that should not have happened.

In so finding, it is noted that other agents have submitted late extensions and/or supervised an offender past a discharge date just like Schmittinger did and have not been disciplined for it. We will address this topic later in our discussion when we review the appropriateness of the discipline imposed.

At the hearing, Schmittinger raised several defenses which she contends should excuse and/or mitigate her conduct. We will address them next.

First, she alleges she had an unmanageable workload. However, the record shows that her workload was roughly the same as the other agents in her office. Aside from that, the record shows that while Schmittinger was on FMLA leave for much of November, other agents covered her work. Because of that, she could have requested help, that someone check on the status of her extension request for SC, or that someone refile the SC extension. However, she did none of those things. The foregoing persuades the Commission that Schmittinger's workload does not justify her negligence.

Second, Schmittinger tried to take the focus off her by blaming the workload management system and contends it was wrong many times. However, even if that is true, Schmittinger was provided weekly work due lists and also received a monthly report as well. Moreover, the record shows that Schmittinger's supervisor, Drexler, discussed the SC extension situation in a meeting the two had on September 23, 2019. Because of that meeting, Schmittinger was aware that she needed to act relative to getting SC's supervision extended, and the timeline for doing that.

Finally, Schmittinger points the proverbial finger of blame at another coworker (Hervat). What Schmittinger is referring to is this: in early 2020, SC's file was reassigned from Schmittinger to Hervat. After Hervat got the file and reviewed it, he discovered that SC was still being supervised even though he had been discharged on November 30, 2019. According to Schmittinger, if she is guilty of misconduct, then so is Hervat. The Commission finds Schmittinger's attempt to shift blame to her coworker is misplaced. It was not the coworker that caused SC to be supervised beyond his discharge date; it was Schmittinger who did that. All the coworker did was discover Schmittinger's error. Said another way, that coworker brought Schmittinger's negligence to management's attention. That being so, that coworker did not commit misconduct.

Having addressed those defenses and found them unpersuasive, we find that Schmittinger committed workplace misconduct when she 1) failed to timely file for an extension of SC's supervision so SC discharged from supervision owing financial obligations; and 2) subsequently supervised SC past his discharge date. Schmittinger is responsible for her workplace misconduct and can be disciplined for same. DOC therefore had just cause to discipline Schmittinger for that misconduct.

The focus now turns to the level of discipline imposed here. Schmittinger contends that even if she committed misconduct, she should not have been suspended for three days. She avers

that she should have instead received a letter of expectation. Thus, in this case, the Commission is tasked with deciding whether Schmittinger's punishment was excessive.

Schmittinger claims that she was subjected to disparate treatment and treated more harshly than other agents. An employee who raises a disparate treatment claim has the burden of proving that contention. To support her claim of disparate treatment, Schmittinger relies on an exhibit which consists of information she obtained from the Wisconsin Circuit Court Access Program (CCAP) website about various offenders. According to Schmittinger, that exhibit "shows a litany of Appellant's coworkers who committed the same infractions as Appellant."

When that exhibit is considered in conjunction with another exhibit that identifies the discipline imposed on probation and parole agents in the last several years, it shows that eight other agents have filed late extensions and/or supervised an offender past a discharge date. That means that those agents committed the same infractions as Schmittinger did. Said another way, eight of Schmittinger's coworkers did the same thing Schmittinger did. While what those employees did constituted misconduct, none of them received formal discipline for doing it. While two of those employees received letters of expectation, a letter of expectation is not considered formal discipline. The two situations where the employees received a letter of expectation will be addressed later in our discussion.

The situation just referenced raises this rhetorical question: when a number of employees commit the same type of misconduct, and the employer has not previously disciplined them for it, does that mean that the employer is foreclosed from disciplining employees for that misconduct going forward? While there could be a situation where that happens because the employer was aware of the employees' misconduct and did nothing to address it, that is not the situation here. In this case, with a caveat that will be noted later, the supervisors testified they were unaware of agents who filed a late extension and continued to supervise an offender past a discharge date. That is significant, of course, because an employer cannot be expected to investigate and discipline for matters they are not aware of. It is only after they become aware of the alleged misconduct that they can investigate it and take the steps necessary to ensure comparable treatment. Here, DOC avers that it did not know of "other potential extensions of supervision without authority" until this case was litigated. DOC further avers that it will be looking into whether other agents filed late extensions and supervised offenders past their discharge date and, if so, discipline them for that misconduct. The Commission accepts that assertion at face value. Consequently, even if other agents have filed late extensions and supervised offenders past their discharge date, that does not make it acceptable conduct or mean that DOC cannot discipline employees for doing that. They can.

The focus now turns to the previously mentioned caveat. It involves two situations where employees received letters of expectation. The first one occurred in 2017. Here is the Employer's description of what happened in that case: "Allowed offender to discharge from supervision with financial obligations. Offender was taken into custody after he discharged from supervision." The second situation occurred in 2019. Here is the Employer's description of what happened in that case: "Did not follow ECRM timelines for investigations or request a hold extension." For the purpose of discussion, it is assumed that these two employees committed the same infractions

as Schmittinger did (i.e. a late extension and supervising after discharge). Schmittinger contends that since they got a letter of expectation, that should have been what was imposed on Schmittinger. The Commission finds otherwise for this reason. When employees commit the same misconduct, their punishment does not always have to be identical. That is because employers can, and do, consider the employee's past disciplinary history when meting out discipline. An employee with no disciplinary history can be treated more leniently than, say, an employee with a substantial disciplinary history. The record shows that one of the employees who received a letter of expectation had no prior discipline. While we do not know the disciplinary history of the other employee, we do know Schmittinger's disciplinary history. She received a one-day suspension in March 2020. Because of that one-day suspension, the Employer did not have to give Schmittinger a letter of expectation (like it did the other two employees). It could rightfully impose harsher discipline. The record further shows that Schmittinger got that suspension because she did not release an offender from jail when he was supposed to be released and, as a result, he spent an extra 17 days in jail. Thus, her actions in that matter led to the deprivation of an offender's liberty. That same thing happened here where, once again, Schmittinger deprived an offender of his liberty by keeping him on supervision after he was discharged. The next level of discipline under DOC's progressive discipline system after a one-day suspension is a three-day suspension. Since that is what was imposed here, the three-day suspension passes muster with the Commission. Accordingly, the Commission concludes that there was just cause for Schmittinger's three-day suspension.

Issued at Madison, Wisconsin, this 17<sup>th</sup> day of September 2020.

## **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman