

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MICHAEL KAHL, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0105

Case Type: PA

DECISION NO. 39313

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Appearances:

Attorney Lane Fitzgerald, Fitzgerald Law Firm, 2031 S. Riverside Drive, Unit A, Beloit, Wisconsin, appearing on behalf of Michael Kahl.

Attorney Nicole Rute, 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 Health Services.

**DECISION AND ORDER**

On November 10, 2021, Michael Kahl filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Health Services (DHS).

A telephone hearing was held on January 13, 2022 by Commission Examiner Peter G. Davis. DHS filed a post-hearing brief on January 24, 2022. Kahl file a responsive brief on January 31, 2022. DHS filed a reply brief on February 7, 2022.

On February 21, 2022, Examiner Davis issued a Proposed Decision and Order affirming the discharge by DHS. No objections were filed by the parties by the deadline given of February 28, 2022.

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

### **FINDINGS OF FACT**

1. Michael Kahl, herein Kahl, was employed by the State of Wisconsin Department of Health Services as a Chaplain at the Winnebago Mental Health Institute (WMHI). He had permanent status in class at the time of his discharge.

2. At the request of a minor female receiving in-patient psychiatric care at WMHI, Kahl conducted an unauthorized effort to cast out the demons the minor female believed possessed her. Several other minor female patients were present. During Kahl's effort, the female rose from her chair and began to move toward Kahl. Kahl told the female to "Sit down" and she did so. The minor female patient and several of the others who were present for some or all of Kahl's effort were negatively impacted -including one of whom began to self-harm.

3. Because several of the minor female patients were observed leaving and returning to Kahl's effort to cast out demons, WMHI staff became aware of Kahl's conduct and one staff member intervened to end his effort. Kahl and that staff member then had a heated discussion about the propriety of Kahl's action. Kahl defended his conduct and behaved in a discourteous and intimidating manner.

4. On a separate occasion, Kahl was asked by a minor female patient receiving in-patient psychiatric care at WMHI whether being a lesbian is wrong. Kahl asked the patient if she wanted the biblical answer to the question. After receiving an affirmative reply, Kahl told the patient that homosexuality was a sin. The patient replied "Fuck your Bible."

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 Health Services did have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Michael Kahl.

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

### **ORDER**

The discharge of Michael Kahl by the State of Wisconsin Department of Health Services is affirmed.

Issued at Madison, Wisconsin, this 9<sup>th</sup> day of March, 2022.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

Section 230.34(1)(a), Stats., states in pertinent part:

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.

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

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

Kahl's discharge letter stated the following in pertinent part:

This is official notice that your employment as a Chaplain in the Department of Health Services, Division of Care and Treatment Services, Winnebago Mental Health Institute is terminated effective August 23, 2021, for violation of WMHI 217.08 Pastoral Care, WMHI Policy 211.09 Patient Rights, WMHI 108.18 Code of Conduct policies, and the following State of Wisconsin Work Rules: (2) Failure to comply with written agency policies or procedures. (3) Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments, directions, or instructions. (13) Threatening or attempting to inflict, or inflicting bodily harm or mental anguish to another person. (14) Intimidating, interfering with, harassing, demeaning, treating discourteously, or bullying; or using profane or abusive language in dealing with others. Specifically, on March 15, 2021, you participated in an unauthorized spiritual interaction with patients residing on a youth/adolescent unit. You spoke in a loud voice which appeared to be a different language to those in the room as you attempted to rid a patient of their demons. This behavior and loud tone invoked fear in the youth patients as some asked to leave. Instead of allowing the patient to leave as requested, you instructed the patient to sit down as you continued the casting out ritual. Additionally, you failed to carry out the verbal direction from the NC2 to stop the religious service and questioned the NC2 in front of other employees and patients. An investigatory meeting was held on April 1, 2021. You attended with your representative Tyler Dukelow, and Management was represented by Carolyn Pierre and Nancy Irizarry. During this meeting, Management asked you a series of

questions related to the alleged misconduct. In response you acknowledged completing this religious service, and that you were doing what needed to be done. You also stated that you felt the NC2 was the aggressor in this situation. With regard to answering a patient's question on whether or not bisexuality is a sin, you acknowledged that you provided a bible-based answer, and stated that the bible deems homosexuality as a sin. A pre-disciplinary meeting was held on May 3, 2021, and a follow-up pre-disciplinary meeting was held on July 28, 2021. You attended both meetings with your representative Tyler Dukelow, and Management was represented by Carolyn Pierre and Nancy Irizarry. During these meetings, Management reviewed the findings of their investigation and provided you the opportunity to refute those findings, along with the ability to provide any mitigating information. In response you said that the NC2 was the aggressor and you did not take accountability for your actions, with the exception of stating that the religious service could have taken place in a private location. You noted that you were unfamiliar with the WMHI Policy 211.09 Patient Rights and Resources and WMHI Policy 217.08 Pastoral Care, therefore could not speak to those violations. No information was provided that mitigates not taking disciplinary action. Based on the information provided, it has been concluded that you did violate Work Rules 2, 3, 13, and 14. After careful consideration, based on the egregiousness of your misconduct the decision has been made to terminate your employment.

The evidence presented at hearing does not substantiate all of the factual allegations made in the discharge letter.<sup>1</sup> However, as reflected in Findings of Fact 2-4, the State did prove the essential elements of the misconduct alleged therein and the basis for the discharge decision. Based on testimony presented at hearing, it is apparent that the primary basis for discharge is summarized in Finding 2 with Finding 4 confirming DHS conclusion as to Kahl's lack of judgment. Finding 3 as to intimidating behavior provides an additional act of misconduct supporting the discharge decision.

Kahl readily admits the actions recited in Findings 2 and 4 and referenced in the discharge letter and he does not view them as improper. Thus, even if the disputed conduct described in Finding 3 were not present, the Commission is satisfied that Kahl has thereby demonstrated a fundamental lack of the judgment necessary to be a Chaplain in a psychiatric institution providing in-patient care for minors. Therefore, the Commission concludes that there was just cause for his discharge.

Kahl attacks the discharge decision on various bases. None are meritorious. Each will be discussed.

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<sup>1</sup>As to the claim that Kahl did not allow the patient to leave, Kahl admits he did instruct the patient to sit down when she rose during the attempt to cast out demons. While his claim that he was acting in self-defense borders on the laughable, it is not clear the patient was attempting to leave when she rose. Thus, this allegation was not proven.

As to the claim that he failed to follow the staff person's directive to stop the casting out, while Kahl adamantly expressed his belief that he was acting appropriately, he did comply with her directive to end his effort. Thus, this allegation was not proven.

Kahl claims discharge was improper because he was never provided with medical information that would have allowed him to know what types of conduct he should avoid. Kahl did not need to know specific diagnosis to steer clear of trouble. Common sense would have told him that he should tread very carefully if he was to stray beyond conventional prayer, religious songs and Bible study in his role as Chaplain. Common sense would have informed Kahl that attempting to cast out demons from a female minor being treated for mental illness was conduct to avoid unless approved by the minor's medical care team and potentially the minor's parents. Common sense would have informed Kahl that such conduct in the presence of other minor females who were also being treated for mental illness was unwise. Common sense would have informed Kahl that any comment regarding the propriety of being lesbian was a bad idea when the question came from a minor female being treated for mental illness who may well have been sorting out her own sexuality.

Kahl makes a related argument in the context of the following language from DHS policy.

(3) Requirement of Forewarning or Foreknowledge Discipline is based on just cause, which requires that an employee have forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct. In some circumstances, an employee's transgressions may be so blatant, such as theft or the assault of a coworker, that he or she should already be expected to know that the conduct is punishable. In other cases, the issuance of a policy or directive serves as forewarning.

Kahl contends that he did not have "forewarning" or "foreknowledge" that what he did could lead to discipline or that his "transgressions" were so blatant that he should have been expected to know that discipline might occur. As discussed above, common sense would have been sufficient to forewarn Kahl that his actions as set forth in Findings 2 and 4 would expose him to discipline. While Kahl is correct that the examples of "blatant" misconduct in the policy require some degree of intent to harm, the Commission does not agree that intent to harm is a requisite for misconduct to occur. It cannot reasonably be argued that unintentional conduct that nonetheless causes harm is not subject to discipline under a just cause standard or that the DHS policy quoted above precludes discipline for such conduct. While there is no evidence that Kahl intended to cause harm, he clearly did so. In addition, there is a policy as to circumstances in which parental consent must be obtained for certain activities and Kahl himself testified as to instructions he received from management as to when parental consent was needed. Kahl's unreasonable judgment that parental consent would not be needed under that policy for his conduct described in Finding 2 clearly violated that policy. Further, while Kahl disputes Finding 3, he cannot reasonably contend that intimidating behavior in the workplace is not punishable as a work rule violation.

Kahl alleges that he was not given notice of certain of the allegations against him and thus did not have an opportunity to respond or defend. The record reflects that Kahl was a participant at two pre-disciplinary meetings where the factual allegations against him were reviewed and he had a chance to respond and provide any mitigating information. Thus, Kahl received the due process to which he was constitutionally entitled particularly where, as here, he also receives a Commission hearing as well. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532

(1985); *J\_K\_v. DHS*, Dec. No. 30860-B (WERC, 10/04). To the extent Kahl focuses on a violation of patient confidentiality rights which formed a partial basis for the DHS discharge rationale, DHS admits that this legal conclusion had not been expressly raised before the Commission hearing. However, the Commission does not read *Loudermill* as requiring that an employer provide an employee with all the arguments it may ultimately rely upon when ultimately deciding to discharge an employee. Rather, the focus of a pre-disciplinary hearing is on the facts that may be relevant. Here, the facts as to presence of multiple individuals during the “cast out the demons” effort are undisputed. Obviously, Kahl also had an opportunity during the Commission hearing and in post hearing argument to respond to this DHS legal argument once it became known.

As to the interaction referenced in Finding of Fact 3, Kahl denies that he behaved inappropriately. The staff person who was the other participant in the conversation testified credibly that Kahl’s body language and close physical proximity was intimidating. Her testimony was corroborated by other witnesses who were present. Kahl contends that the staff person is lying because she disagrees with his comment as to homosexuality being a sin.<sup>2</sup> He further asserts that the corroborating witnesses are lying because they are friends with the staff person. The Commission does not find Kahl’s contentions to be persuasive. Further, as discussed earlier herein, the interaction referenced in Finding 3 was not a primary basis for the discharge decision.<sup>3</sup> However, Kahl’s defense of his conduct during that interaction provides further evidence that he lacks the judgment needed to be the Chaplain in that DHS institution.

Kahl contends that DHS discharged him because it lacks respect for his personal religious views. As evidence of this contention, he points to the fact that the word “bible” was not capitalized in the discharge letter. It is not known why “bible” was not capitalized. In any event, the Commission concludes that Kahl has not provided persuasive evidence to support this claim.

To the extent that the Commission finds that misconduct occurred, Kahl contends that applicable law does not allow DHS to move directly to discharge as opposed to a lesser progressive level of discipline.

Section 230.34 (1)(a), Stats. provides that it is just cause for the State to discharge an employee without imposing progressive discipline for any of nine listed types of misconduct. Kahl is not charged with any of those nine types of misconduct. However, section 230.04 (13m), Stats. authorizes the Administrator of the Department of Administration, Division of Personnel

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<sup>2</sup>Kahl asserts the Examiner erred by not allowing his attorney to examine the staff person as to her personal definition of sin. The Commission concurs with the Examiner’s ruling that there was no relevant basis for the inquiry expressed by the attorney at the time the question was posed. This witness was not a decision maker as to whether Kahl should be disciplined. Kahl does not dispute that he made the comment described in Finding 3. Ultimately, the issue is not how sin should be defined but rather whether it is appropriate to discuss “sin” in the context of sexuality with a minor female receiving in-patient psychiatric services. The patient’s response to Kahl confirms that such discussions are not positive.

<sup>3</sup>It is the nature of the interaction itself that forms the basis for a finding of misconduct. To the extent that the interaction was heard by other staff and patients, that was unfortunate. While Kahl deserves some blame for what became a semi-public conversation due to the volume of his remarks, he did not select the location for the conversation.

Management to establish standards that allow the State to discharge State employees without imposing progressive discipline for severe “inadequacy, unsuitability, or inferiority of . . . personal conduct or work performance . . .” The Administrator did so and 25 standards are listed in Chapter 410 the Wisconsin Human Resources Handbook at Section 410.030. DHS adopted those 25 standards as work rules in DHS 501. Given the foregoing, discharge is statutorily permissible without imposing progressive discipline depending on the severity of the employee’s misconduct.

As stated in the discharge letter, Kahl is accused of violating the following four of the 25 State/DHS work rules.

(2) Failure to comply with written agency policies or procedures.

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

(13) Threatening or attempting to inflict, or inflicting bodily harm or mental anguish to another person.

(14) Intimidating, interfering with, harassing, demeaning, treating discourteously, or bullying; or using profane or abusive language in dealing with others.

Kahl asserts that he did not violate any work rules.

As to the alleged violation of Work Rule 2, Winnebago Mental Health Institute (WMHI) Policy 217.08 outlines the Institution’s Pastoral Care Policy. It mandates that the chaplain seek permission from the parents or guardians of minor patients to include the patient in spiritual activities. Kahl did not obtain permission from the parents of the minor female before seeking to cast out demons. As this spiritual interaction was clearly outside of the typical worship services conducted by Kahl, parental consent was required.

WMHI Policy 108.18 outlines a Code of Conduct for institutional staff. This policy specifically provides that fundamental principles of employee behavior include keeping patients safe, treating others with respect and dignity, ensuring public trust through personal and professional integrity. The policy additionally provides certain behaviors which are particularly contrary to the mission and vision of WMHI, including abuse, mistreatment or neglect of any patient, failure to properly carry out duties and responsibilities, intimidation, and failure to treat patients and staff in a courteous, productive, respectful and otherwise acceptable manner. Kahl violated the Code of Conduct policy by the actions summarized in Findings 2-4.

As to the alleged violation of Work Rule 3, Kahl was negligent in his duties when he engaged in an unauthorized spiritual intervention, failed to obtain prior parental consent, failed to consult the treatment team or anyone at WMHI prior to initiating the spiritual intervention, and failed to protect the mental safety of the youth involved.



As to the alleged violation of Work Rule 13, Kahl inflicted mental anguish on the youth present during the casting out of demons.

As to the alleged violation of Work Rule 14, Kahl's conduct summarized in Finding 3 was discourteous and intimidating.

Thus, the Commission is satisfied that Kahl violated the four work rules as well as the specific DHS/WMHI policies referenced above.

Lastly, Kahl argues that discharge is too severe a disciplinary penalty for his actions referenced in Findings 2-4. The Commission disagrees. Kahl's misconduct clearly falls within the statutory severe "inadequacy, unsuitability, or inferiority of . . . work performance" standard and also meets the standard established by the Court in *Safransky*. While Kahl had a clean disciplinary record at the time of his discharge, he was not a long-term State employee and his misconduct established that he lacked the judgment needed to perform the duties of a Chaplain at the Winnebago Mental Health Institute.<sup>4</sup>

Issued at Madison, Wisconsin, this 9<sup>th</sup> day of March, 2022.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

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<sup>4</sup>Kahl contends the DHS failed to follow applicable internal procedures for approval of the discharge. The testimony of DHS witness Kleman proves otherwise.