

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KRISTINE HAFERMANN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0559

Case Type: PA

DECISION NO. 39780

Appearances:

Joshua Adderton, appearing on behalf of Kristine Hafermann, 333 East Park Avenue, Berlin, Wisconsin.

David Makovec, 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 November 7, 2022, Kristine Hafermann filed an appeal with the Wisconsin Employment Relations Commission asserting she had been suspended for five days without just cause by the State of Wisconsin Department of Corrections (DOC).

A hearing was held on December 8, 2022, in Fox Lake, Wisconsin, by Commission Hearing Examiner Katherine Scott. The parties made oral arguments at the end of the hearing. On January 4, 2023, Examiner Scott issued a Proposed Decision and Order affirming the five-day suspension by DOC. No objections were filed by the parties by the deadline given of January 9, 2023.

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

FINDINGS OF FACT

1. Kristine Hafermann (Hafermann) is employed by the State of Wisconsin Department of Corrections (DOC) as a correctional officer (CO) at Fox Lake Correctional Institution (FLCI). She had permanent status in class when she was suspended.

2. On April 18, 2022, Hafermann used the word “fuck” multiple times while working in the FLCI pass room, while inmates were present.
3. On April 28, 2022, Hafermann directed profanity at an inmate while working in the FLCI property room.
4. DOC suspended Hafermann for five days for violating a work rule forbidding harassing, demeaning, treating discourteously, bullying, or using profane or abusive language in dealing with others.

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 Kristine Hafermann 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 five-day suspension of Kristine Hafermann by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 31st day of January, 2023.

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.

Kristine Hafermann 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 Hafermann was guilty of the alleged misconduct and that the misconduct constituted just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

Hafermann was employed as a correctional officer (CO) at Fox Lake Correctional Institution (FLCI). It is uncontested that on two separate occasions in April 2022, Hafermann used profane language around inmates of the Department of Corrections (DOC).

It is undisputed that on April 12, 2022, Hafermann used the word “fuck” multiple times while working in the FLCI pass room. Inmate Jesse Cunningham made a report through the inmates’ complaint system that Hafermann called him a “motherfucker.” Although Cunningham was not available to testify at the hearing, Kristi Fuerstenau – the deputy warden’s secretary who was present in the pass room at the time – credibly testified that Hafermann used the word “fuck” multiple times. Fuerstenau also testified that Hafermann was on a call at the time and the profanity was directed at the person she was speaking to on the phone. Fuerstenau further testified that the pass room they were working in was very small, and that Hafermann was aware that there were inmates present.

It is also undisputed that on April 28, 2022, Hafermann used profanity in a conversation with an inmate while working in the FLCI property room. Three people who were present in the property room during the exchange – inmate Jumal Jemison, inmate Kejuan Thomas, and Officer Jason King – agreed that after Jemison asked Hafermann about his confiscated property, the exchange became heated, and Hafermann directed profanity at Jemison. The parties differ as to the exact profane language. Jemison testified that when he asked Hafermann about his confiscated property, she replied “I don’t fucking know, I didn’t search your fucking room.” Thomas testified that Hafermann told Jemison, “Don’t fucking talk to me like that.” Officer King testified that Hafermann told Jemison “I don’t have your shit.”

Hafermann has an extensive history of receiving discipline for using profane or derogatory language in the workplace. In May 2018, she received a letter of expectation about using profanity in the workplace. In July 2018, she received a one-day suspension for violating DOC Work Rule #14 (intimidating, interfering with, harassing, demeaning, treating discourteously, or bullying; using profane or abusive language in dealing with others). In August 2021, she received a five-day suspension for violating Work Rule #14, among others. It is worth noting that this current five-day suspension was a repeat, rather than a progression or a skip, in discipline. Warden Michael Meisner decided to give Hafermann another five-day suspension instead of progressing to termination. He testified that if an employee without Hafermann's work history had received these two complaints about profanity, it might have been handled with a letter of expectation.

Hafermann argued that she was simply using her "prison voice" in these encounters. Her representative defined "prison voice" as "projecting your voice so other people can clearly hear you." This is irrelevant since the substance – not the volume – of Hafermann's speech is at issue here.

Hafermann also argued that other staff regularly use profanity, so she was being unfairly singled out for discipline. Hafermann argued that there have been no other disciplines based on profanity at FLCI. Kristie Fuerstenau, Officer King, and Officer Landaal all credibly testified that although FLCI employees use profanity when speaking to other employees, FLCI employees generally do not use profanity around inmates.

In *Morris v. DOC*, Dec. No. 35682-A (WERC, 7/15), the Commission detailed how it would analyze claims such as the one Hafermann makes here. The Commission stated:

"We have long recognized that disparities in discipline may, under certain circumstances, undermine an assertion that just cause exists. Underlying that position is the notion that if an employer treats one employee significantly more harshly than a similarly situated coworker there must be something other than the misconduct itself that caused the disparity. The argument is also made with regard to lesser penalties but is of less consequence in those matters. We are far more willing to defer to management's discretion when the disparity is between discipline short of discharge. We have no statutory obligation to require consistency in treatment."

Hafermann did not offer an example of a similarly situated employee at FLCI who used profanity at or around inmates and was not disciplined. Officer King testified that he uses profanity around inmates. Unlike Hafermann, however, inmates had not submitted written complaints about King's behavior, and King offered no testimony that FLCI supervisors or management were aware of his behavior and chose not to discipline him as they had Hafermann. It is not known whether King shares Hafermann's extensive history of discipline for using profanity in the workplace.

Instead, Hafermann cited two previous cases in which DOC employees had profanity-related disciplines overturned: *Sawall v. DOC*, Dec. No. 34019-D (WERC, 5/15) and *Peterson v. DOC*, Dec. No. 39411 (WERC, 4/22). However, these cases are easily distinguishable from the

incidents discussed here. First, neither of the cases originated from FLCI, so there was a different warden – or decision-maker – applying DOC work rules regarding profanity. Second, the misconduct in *Sawall* and *Peterson* occurred under different circumstances. In *Sawall*, the employee was speaking to another employee, not an inmate. Further, the profanity was used to describe a third party; it was not directed at the other employee. In *Peterson*, the employee was communicating with an inmate, but he was using a “verbal judo” communication method to develop a rapport with the juvenile offenders at that correctional facility. Here, Hafermann was directing profanity at an inmate because she was angry at him; she was not trying to develop a rapport. Third, neither of the employees in *Sawall* and *Peterson* had Hafermann’s extensive history of using profane or derogatory language in the workplace.

Hafermann violated the work rule prohibiting profanity around inmates on two separate occasions. This behavior was clearly distinguishable from the cases she presented as comparable. Warden Meisner credibly testified that profane and disrespectful language undermines the safe, orderly operation of the institution, because it has the potential to escalate situations and make them more unsafe. By using profane and disrespectful language at and around inmates, Hafermann has repeatedly violated the work rule, belittled inmates, and undermined safety at FLCI. There was just cause for the five-day suspension, and the suspension is therefore affirmed.

Issued at Madison, Wisconsin, this 31st day of January, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman