

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JEANETTE BRAND, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0563

Case Type: PA

DECISION NO. 39897

Appearances:

Jakob Feltham, Attorney, Hawks Quindel, 409 E. Main St., Madison, Wisconsin, appearing on behalf of Jeanette Brand.

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 December 8, 2022, Jeanette Brand filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Corrections (DOC).

A hearing was held on February 13, 2023, in Portage, Wisconsin, by Commission Examiner Katherine Scott. The parties made oral arguments at the end of the hearing. On March 21, 2023, Examiner Scott issued a Proposed Decision and Order rejecting the discharge, modifying it to a letter of expectation. DOC filed objections to the Proposed Decision on March 27, 2023 and Jeanette Brand filed a response to the objections on March 31, 2023.

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

FINDINGS OF FACT

1. Jeanette Brand (Brand) was employed by the State of Wisconsin Department of Corrections (DOC) as a correctional sergeant (CS) at Columbia Correctional Institution (CCI). She had permanent status in class when she was discharged.

2. On July 6, 2022, Brand was present during an incident in which an inmate, R, attacked several correctional officers. Brand and other officers were sprayed with pepper spray. During this incident, Brand's arm was injured.

3. The contemporaneous logbook in the CCI "bubble" stated that R had struck Brand during the incident.

4. Brand's supervisor pressured her to complete an incident report shortly after the incident, while Brand was still shaken by the encounter.

5. Brand and several of her coworkers who witnessed the incident completed incident reports which stated that R had struck Brand.

6. Brand also completed an Employee Workplace Injury or Illness Report saying that, to the best of her knowledge, her account of the incident was true and that her injury was incurred in the performance of her duties.

7. Brand was diagnosed with trapezius strain and internal derangement of the right shoulder and took two weeks of leave to undergo physical therapy.

8. The security camera footage revealed that R had no contact with Brand during the incident.

9. Following an investigation, the DOC discharged Brand for violating work rules forbidding falsification of agency records and making false or inaccurate statements.

10. Brand's coworkers, who also completed incorrect incident reports, were neither investigated nor disciplined.

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 did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Jeanette Brand.

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

ORDER

The discharge of Jeanette Brand is rejected, and no letter of expectation is to be issued. Brand shall immediately be reinstated to her former position and made whole with interest.¹

Issued at Madison, Wisconsin, this 7th day of April, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ See Wis. Admin. Code § ERC 94.07.

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.

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

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

Brand was employed as a correctional sergeant (CS) at Columbia Correctional Institution (CCI). On July 6, 2022, she was present during an incident in which an inmate, R, attacked several correctional officers. During the incident, one of the officers attempted to use a taser on R, and another deployed pepper spray. R struck two officers, Lange and Gauf, before attempting to escape into the yard.

This was the first violent incident that Brand had been involved in during her time working for the DOC. She testified that she was terrified, blinded by the pepper spray, and disoriented. The last thing she saw before she was totally blinded was the inmate, R, coming toward her. Blinded, she followed the other officers out into the prison yard, where the other officers chased R down and subdued him.

After the incident, Captain Sanneh asked who had been injured. Brand's shoulder was painful, so she raised her hand, along with Lange and Gauf. Captain Sanneh handed Brand an incident report and told her to complete it. Brand protested, saying she was shaking, wasn't sure what happened, and didn't feel right. Sanneh told Brand to put down what she (Brand) thought had happened, because she could always change it later if it was wrong. Immediately after the incident, Sanneh instructed Brand to relieve the sergeant in the "bubble," a small security room used by the CCI staff that had an unobstructed view of the room in which the incident had taken place. Sanneh told Brand to complete the incident report with "one eye on the security monitors," so she completed the incident report in the bubble.

Brand took the forms to the bubble with her, where she checked the logbook to confirm her recollection of events. The logbook is supposed to be an accurate and contemporaneous account of everything the correctional officer stationed in the bubble observes during their shift.

Since the logbook said that R had struck Brand during the incident, Brand wrote that down in her incident report. Appellant's Exhibit 103, pg. 2.

Brand initially thought her arm was just bruised, but on July 11, 2022, she woke up in pain and went to the emergency room. She was diagnosed with trapezius strain and internal derangement of the right shoulder and was told to take two weeks off from work. Appellant's Exhibit 101, pg. 15. A July 20 MRI confirmed the diagnosis. Appellant's Exhibit 101, pg. 19. During that time, Brand had difficulty with daily actions, including driving and cooking for her daughter. Brand had no history of shoulder pain or injury. Her injuries were treated with a cortisone injection and physical therapy twice a week, including dry needling.

A review of body camera footage of the incident several weeks later showed that Brand could not have been injured by R, because R never came close to her. Several of Brand's coworkers – including Cooper Lange, Anthony Johnson, and William Conroy – had also reported that R struck Brand in their incident reports. Lange, Johnson, and Conroy all had the opportunity to view the body camera footage. Brand did not.

There is no dispute that Brand's arm was seriously injured at some point during the July 6, 2022 workday, but how Brand's arm *became* injured is a matter of dispute. The State argues that Brand injured her arm during a training earlier that day, during which she and other officers had practiced self-defense maneuvers. Brand argues that, blinded by pepper spray, she knocked her arm against a door trying to follow the other officers out into the prison yard. The body camera footage does not depict Brand running through the doors, though it does show a series of narrow doors that would have been difficult to navigate, especially while blinded by pepper spray. The State offered no evidence or testimony to disprove Brand's assertion that she injured her arm running through the doors.

After viewing the body camera footage, Warden Larry Fuchs initiated an investigation into Brand, which included an interview of Brand by an internal affairs investigator. Brand's coworkers Lange, Johnson, and Conroy were neither investigated nor disciplined for completing false reports.

Brand was shown the body camera footage for the first time at her interview. She was shocked, then corrected herself and apologized. Brand sought mental health treatment following the interview; she said she thought she had "lost her mind." Brand also corrected the record at her physical therapy: she informed the therapist that she had injured her arm running into a door, not in an encounter with an inmate. She said she felt it was important to "correct the record."

Lange, Johnson, and Conroy were also interviewed as part of Brand's investigation. Unlike Brand, they had already had the opportunity to view the body camera footage and were able to walk back their inaccurate reports in their interviews.

There was no evidence or testimony that Brand encouraged her coworkers to fill out false reports. It is also worth noting that Brand has no prior discipline.

Psychologists agree that trauma warps memory and recall.² Studies have demonstrated how memories of an incident, even one witnessed firsthand, can be reshaped by false, contradictory information received later.³ This was Brand's first violent encounter at work, during which she was pepper sprayed, blinded, and terrified. It stands to reason that Brand's memory of the incident would be imperfect. It also stands to reason that, in the wake of this confusing and violent event, Brand would rely on the logbook to affirm her recollection of what had happened. It is also worth noting that Brand's supervisors, particularly Captain Sanneh, pressured her to complete an incident report when she explicitly said she wasn't prepared to do so. Her supervisors never gave her the opportunity to review footage of the incident before filing the report.

Brand honestly, but mistakenly, believed she had been struck by R. The WERC has previously held that falsifying agency records requires a finding that it was done knowingly or intentionally. *Sawall v. DOC*, Dec. No. 34019-D (WERC, 5/15). As the WERC has previously noted: "While it is important for employees to be truthful in the performance of their duties, witnesses can differ in their interpretation and observations. Not every factual dispute is evidence of an intentional falsehood." *Tomaszewski v. DOC*, Dec. No. 35077-B (WERC, 6/16). Since Brand did not complete an incorrect incident report or other records knowingly or intentionally, she did not falsify agency records.

The State argues that Brand was injured during the training and lied about being injured by an inmate because, per Wis. Stat. § 230.36(1m)(c), she could only take paid leave – and not have to use her sick leave – if she was injured by an inmate. However, the State provided no evidence or testimony to assert that Brand was injured during the training or to contradict Brand's credible testimony that she was injured by running into a door while chasing after inmate R. Further, Wis. Stat. 230.36(1m)(a) and (b) allow hazard pay for an injury that occurs "in the process of quelling a riot or disturbance or other act of violence" or "in the process of restraining ... inmates." Since Brand was injured running after an inmate who created a disturbance, attempting to restrain him, she was entitled to paid leave under Wis. Stat. § 230.36(1m).

Brand argues that she was subject to disparate treatment. Her coworkers, who by their own admission also filed false and inaccurate incident reports, were neither investigated nor punished. In fact, they were allowed to view the body camera footage of the incident before they were interviewed. In *Morris v. DOC*, Dec. No. 35682-A (WERC, 7/15), the Commission detailed how it would analyze claims such as the one Brand 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

² Strange, D., Takarangi, M.K.T. (2015). Memory Distortion for Traumatic Events: The Role of Mental Imagery. *Frontiers in Psychiatry*. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4337233/>

³ Loftus, E. (1992). When a Lie Becomes Memory's Truth: Memory Distortion after Exposure to Misinformation. *Current Directions in Psychological Science*. <https://www.jstor.org/stable/20182152>

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.”

Warden Fuchs argued that Brand was held responsible, when others weren't, because she originated the incorrect recounting of events. However, Brand was discharged, while at least three other employees were not investigated and received no discipline for the same conduct – not even a letter of expectation. Brand was subject to disparate treatment.

Brand did not violate the work rules prohibiting falsification of agency records and making false or inaccurate statements. She made a mistaken statement in good faith, shaken by a violent encounter at work and under pressure from her supervisors to complete a report quickly rather than accurately. When it was revealed that her memory of the incident had been distorted by trauma and the inaccurate recollections of others, Brand apologized, corrected herself, and attempted to take responsibility for her actions. Brand made a one-time, good-faith error. Her coworkers, who also filled out inaccurate incident reports, were given the opportunity to view the video, were not investigated, and received no discipline. Because Brand made a good-faith error and received disparate treatment, there was no just cause for her discharge.

Given the foregoing, the discharge of Jeanette Brand by the State of Wisconsin Department of Corrections is rejected, and no letter of expectation is to be issued. Brand shall immediately be reinstated to her former position and made whole with interest.⁴

Issued at Madison, Wisconsin, this 7th day of April, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

⁴ While Brand seeks additional relief that she be transferred to another facility, the record doesn't support a basis for such. Both sides have a defensible and good-faith position to argue in this matter and, as such, DOC's position doesn't suggest that she would be treated unfairly upon her return to CCI. If Brand wants a change in scenery and to be placed at another DOC facility, she is more than able to facilitate that request internally through proper DOC procedures.