

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARY KATE HERMSEN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0607

Case Type: PA

DECISION NO. 40235-A

Appearances:

Nicholas E. Fairweather and Emma E. Knatterud-Johnson, Attorneys, Hawks Quindel S.C., 409 E. Main Street, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of Mary Kate Hermsen.

Nicole M. Porter, Attorney, 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 Corrections.

DECISION AND ORDER

On November 21, 2023, Mary Kate Hermsen 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 (DOC). The appeal was assigned to Commission Examiner Anfin Jaw.

A Zoom hearing was held on January 10 and 12, 2024, by Examiner Jaw. The parties submitted written closing argument on January 26, 2024. Neither party filed a response by the given deadline of February 2, 2024.

On February 20, 2024, Examiner Jaw issued a Proposed Decision and Order affirming the three-day suspension of Mary Kate Hermsen by the DOC. Hermsen filed objections to the Proposed Decision on February 26, 2024. The DOC filed a response to the objections on March 4, 2024.

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

FINDINGS OF FACT

1. Mary Kate Hermsen (Hermsen) is employed by the State of Wisconsin Department of Corrections (DOC), Division of Adult Institutions, as a Recreation Leader-Senior at Prairie Du Chien Correctional Institution (PDCI) and had permanent status in class at the time of her three-day suspension.

2. The DOC is a state agency responsible for the operation of various corrections facilities including PDCI, a minimum-security facility located in Prairie de Chien, Wisconsin.

3. In March 2023, Hermsen failed to follow a work directive that prohibited inmates from entering a restricted area of the gymnasium.

4. Hermsen displayed favoritism when she allowed certain inmates special privileges and free access to restricted areas of the recreational area, as well as allowing them to store their personal belongings in a restricted area.

5. Hermsen also spent an extended amount of time conversing with inmate A, allowed him in the restricted area, and gave him additional recreation time to complete a sewing task without formal approval.

6. Hermsen failed to follow a work directive by allowing an inmate volunteer to perform work without an approved Inmate Work Program Placement form, DOC-1408.

7. DOC suspended Hermsen for three days for the conduct referenced in Findings 3, 4, 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 Mary Kate Hermsen 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 Mary Kate Hermsen by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 8th day of March 2024.

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.

Mary Kate Hermsen 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 Hermsen 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).

As a Recreation Leader-Senior at PDCI, Hermsen's primary responsibility is the operation and coordination of the recreation department for inmates. The recreation department comprises the gymnasium, recreation yard, courtyard, and some unit activities. Recreation Leader responsibilities include direct supervision of inmates and inmate workers, ordering supplies and materials, maintaining records, completing reports, inventory of equipment and supplies, and general upkeep of equipment. Hermsen also organized recreational and intramural sports, as well as assisted inmates with arts and crafts and other leisure skills.

On November 8, 2022, in response to security concerns arising out of the SE corner of the gymnasium, Security Director Russell Bausch sent an email directive to all staff at PDCI, explicitly prohibiting inmates from entering the southeastern area of the gymnasium, including the stairwell to the second floor, staff bathroom, and the shoe locker storage area. Staff were given the direction that if there was an item that an inmate needed from the restricted area, staff must obtain the item for the inmate. Additionally, staff were reminded that there were to be no inmate volunteers without an approved Inmate Work Program Placement form, DOC-1408. These directives were also reiterated with the recreation staff, including Hermsen.

While reviewing security footage pertaining to a separate investigation into a possible Prison Rape Elimination Act (PREA) violation by staff member A.V. and inmate A, Hermsen's conduct came under review. Video evidence showed Hermsen talking to inmate A for nearly the entirety of his one-hour recreation time on March 17 and 20, 2023, while the ongoing PREA investigation was underway. The DOC's fraternization policy prohibits communication and

visiting with an inmate that is not job related without an exception being granted. Consequently, DOC formally initiated an investigation into Hermsen's conduct on March 27, 2023.

The investigation found that on March 13, 2023, Hermsen and her coworker, Recreation Leader D.O., permitted inmate A to stay in the recreation area past his allotted time to complete a sewing task without formal approval with a DOC-1408. Video evidence established that Hermsen allowed inmates to freely move in the restricted area of the gymnasium on March 17, 2023. At the hearing, Hermsen admitted that she would allow inmates to reach their arm into the doorway of the restricted hallway to store their coats, sweaters, or shoes.

DOC concluded that Hermsen's conduct violated multiple work rules, including DOC Work Rule #2: Failure to comply with written agency policies or procedures; Work Rule #3: Disobedience, insubordination, inattentiveness, negligence, *failure or refusal to carry out written or verbal assignments, directions, or instructions*; DOC Serious Acts of Misconduct #1: Fraternization with offenders, inmates, or juvenile offenders including, but not limited to: sharing personal information, providing or receiving goods or services, *displaying favoritism*, engaging in a personal relationship, failing to report solicitation by an offender, inmate, or juvenile offender; and DOC Serious Acts of Misconduct #5: *Gross negligence or conduct by an employee which causes a substantial risk to the safety and security of DOC facilities, staff, the community or inmates, offenders or juvenile offenders under DOC's care. Emphasis added.*

DOC argued that Hermsen failed to follow Security Director Bausch's directive that prohibited inmates from entering the SE area of the gym by allowing inmate workers to enter the restricted area. This contributed to an environment where inmates could move about freely in restricted areas, which jeopardizes the safety and security of the facility, inmates, and staff. Additionally, DOC reasoned that Hermsen violated the fraternization policy by giving preferential and favorable treatment to those inmate workers who were allowed to have access to a restricted area to store their belongings, when other inmates were not granted this same consideration. Furthermore, Hermsen failed to follow the work directive by allowing inmate A to stay past his recreation time and complete a sewing task without an approved volunteer form. DOC contended that allowing inmates to volunteer to do tasks they are not approved to do creates a risk to the operations of the Department. Not only does it present a security risk related to the tracking of where inmates are, but it also creates a potential perception that some inmates are being given special treatment. Also, allowing inmates to volunteer without documentation or approval creates a risk to claims made by inmates that they were entitled to pay for the work completed. This could further subject the DOC to possible labor law liability. The Commission agrees with the Department's conclusions.

Based on the record, the Commission is persuaded that Hermsen's conduct was a violation of the four work rules cited by the DOC. Thus, misconduct has been established. Accordingly, the Commission finds that DOC had just cause to discipline Hermsen for her misconduct.

We turn now to the level of discipline imposed here. DOC concluded that a "skip" to a three-day suspension was warranted due to the serious nature of Hermsen's misconduct. Hermsen

has no prior disciplinary history. If following progressive discipline, DOC could have issued a one-day suspension.

At the hearing, Warden Peter Jaeger credibly testified to the severity of Hermsen's misconduct by looking at the totality of the circumstances. The recreation area had been experiencing concerns with multiple PREA allegations and was under evaluation because of these concerns. The directive given was an attempt to protect the security of everyone while this evaluation was taking place. Ultimately, the decision to discipline Hermsen was because of her lack of security awareness and lack of control of an area under her responsibility, which fostered an unsafe work environment creating an unnecessary risk to others in the institution. In addition, favoritism displayed by Hermsen to multiple inmates, along with the excessive amount of time spent with inmate A, violated the fraternization policy. The Department takes fraternization and security very seriously. Given the risks to the Department and the security of the institution, failure to follow security directives, engaging in fraternization with inmates, and violation of two serious acts of misconduct, the Department concluded that Hermsen's serious misconduct warranted a skip in progression.

Hermsen asserts that her discipline should be rescinded or at most, reduced to a non-disciplinary letter of expectation (LOE) because of several reasons. First, Hermsen claims that the DOC is retaliating or punishing her for the alleged PREA violations of A.V. There was a PREA investigation against Hermsen that was unsubstantiated in March 2023. Hermsen argues that DOC conflated the tandem PREA investigation of A.V. with Hermsen's alleged violations. The Commission rejects this argument. The record clearly established Hermsen's serious misconduct and violation of DOC work rules.

Second, Hermsen contends that there is conflicting evidence regarding which Recreation Leader, Hermsen or D.O., initiated the volunteer sewing task and allowed inmate A to stay past his recreation time. During the investigation, D.O. could not remember who initiated the task. In her investigatory interview, Hermsen claimed that it was D.O. who initiated the work to be done by inmate A. However, during the hearing, while under oath, Hermsen could no longer recall who had initiated the work. The Commission finds Hermsen's testimony not credible and self-serving. Settling the factual dispute is of no consequence. Both Hermsen and D.O. were responsible for complying with the legitimate work directive to have an approved DOC-1408 before any work is performed by an inmate. Thus, Hermsen can be held accountable for her failure to follow this work directive.

Finally, Hermsen states that she regularly and appropriately talks with inmates during their scheduled recreation time. Hermsen argues that these regular conversations with inmates were within the scope of her job duties. During these conversations, Hermsen claims she did not share personal information, provide or receive goods or services, display favoritism, or engage in a personal relationship. While the Commission recognizes that general conversation about recreation and sports may be permitted, the significant amount of time spent one on one with inmate A on March 17 and 20, 2023, crosses acceptable and professional boundaries, especially considering the ongoing PREA investigation being conducted at the time involving inmate A.

The Commission has previously acknowledged the seriousness of employees failing to maintain appropriate boundaries with inmates by engaging in excessive time spent visiting with no authorized business purpose. In *Love v. DOC*, Dec. No. 39766 (WERC, 01/23), a case that arose out of PDCI, the Commission found misconduct by staff that had generally not maintained appropriate boundaries with an inmate that enjoyed chatting for extended periods of time. In that matter, we held that the employee should have, but did not establish appropriate boundaries with the inmate, and that the Department has a strong interest in having employees avoid this type of interaction. *See id.* Here, the Commission makes the same finding as it relates to Hermsen and inmate A's interaction.

Given the foregoing, the Commission is not persuaded by Hermsen's defenses, and we conclude that her serious misconduct warrants a skip in progressive discipline. The three-day suspension was not an excessive punishment. Therefore, there was just cause for Hermsen's three-day suspension and it is therefore affirmed.

Issued at the City of Madison, Wisconsin, this 8th day of March 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman