

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**BRIAN THOM**, Appellant,

v.

Secretary, **DEPARTMENT OF CORRECTIONS**, Respondent.

Case 90  
No. 68285  
PA(adv)-152

**Decision No. 32746-A**

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**Appearances:**

**Brian Thom**, 430 Willow Circle, Mayville, Wisconsin 53050, appearing on his own behalf.

**Andrea Olmanson**, Assistant Legal Counsel, Department of Corrections, 3099 East Washington Avenue, P.O. Box 7925, Madison, Wisconsin 53707-7925.

**ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT**

This matter is before the Wisconsin Employment Relations Commission (the Commission) on competing motions for summary judgment. No hearing has been conducted. The underlying appeal involves the Appellant's discharge from his employment as the Assistant Superintendent at the John C. Burke Correctional Center. The parties filed briefs and reply briefs on their motions, with the final argument being received by March 3, 2009. Having reviewed the record developed to date and considered the parties' positions, the Examiner issues the following

**ORDER**

Both parties' motions for summary judgment are denied. The appeal will proceed to hearing.

Dated at Madison, Wisconsin, this 26th day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

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Raleigh Jones, Examiner

No. 32746-A

**DEPARTMENT OF CORRECTIONS (Thom)**

**MEMORANDUM ACCOMPANYING ORDER  
DENYING MOTIONS FOR SUMMARY JUDGMENT**

As noted in the prefatory paragraph, this appeal involves Thom's discharge from the Correctional Center where he was the assistant superintendent. He was discharged for taking a state-owned gas key from his previous Department of Corrections employer, and subsequently using that key on five occasions to unlock a state gas pump and put state gas into his personal car.

While no hearing has yet been held, the case file is already voluminous with exhibits, affidavits, briefs and other motions.

It appears from those submissions that state employees are prohibited from putting gas from state gas pumps into their personal cars. Thom admits that on several occasions, he pumped gas from a state gas pump into his personal car. Thom's defense is that even if he violated state rules by doing that, his conduct did not constitute theft from the Employer because he was simply replenishing the fuel he had burned while driving his personal car on state business. According to Thom, that was permissible conduct. The Employer disagrees.

Since both sides have filed motions for summary judgment, my discussion begins with a review of the applicable legal framework. Chapter 227 in the Wisconsin Statutes states the framework common to administrative agency proceedings. That chapter does not contain a procedure for summary judgment wherein a contested case can be dismissed without a hearing.

Similarly, the Commission does not have a summary judgment procedure which replicates that found in Sec. 802.08, Stats., (the summary judgment procedure for actions in circuit court). Instead, the Commission uses pre-hearing motions to ferret out cases that, among other things, are outside the Commission's jurisdiction or are untimely. Neither of those two situations exist here. With regard to the former (i.e. jurisdiction), it is noted that Thom appealed his discharge to the WERC under Sec. 230.44, Stats. Subsection (1)(c) of that section specifically authorizes non-probationary employees like Thom to appeal certain disciplinary actions to the Commission for review. One of the disciplinary actions referenced therein is discharge. This language gives the Commission jurisdiction over the Appellant's appeal. Next, it is noted that Subsection (4) of that section specifically references hearings. That reference makes the right to a hearing under Sec. 230.44 explicit.

It is in that context, where the Commission clearly has jurisdiction over the disciplinary appeal involved herein, and Thom clearly has the right to a hearing, that both parties essentially seek to avoid going to hearing. The Appellant asks that his discharge be overturned and he be immediately reinstated. Conversely, the Respondent asks that the Appellant's discharge be upheld and his appeal dismissed.

Neither side cites any WERC case law where the Commission has granted summary judgment in a discipline case. That's not surprising because insofar as the Examiner can determine, such case law does not exist. The absence of such case law makes it clear that what each side asks for here is not commonly granted.

In DEPARTMENT OF CORRECTIONS AND DEPARTMENT OF EMPLOYMENT RELATIONS (SCOTT), DEC. NO. 30767 (WERC, 1/04), the Commission granted summary judgment in a reclassification request case. In that case, the Commission adopted the summary judgment approach taken by the Personnel Commission (the Commission's predecessor) for purposes of State civil service personnel appeals. Specifically, the Commission found that it could summarily decide a case – without a hearing – when there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law, citing *BALELE V. WIS. PERS. COMM.* 223 WIS. 2D 739, 745-748, 589 N.W. 2D 418 (Ct. App. 1998). In SCOTT, the Commission went on to say the following:

Generally speaking, the moving party has the burden to establish the absence of any material disputed facts based on the following principles: a) if there are disputed facts that would not affect the final determination, such facts are immaterial and insufficient to defeat the motion; b) inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion; and c) doubts as to the exercise of a genuine issue of material fact should be resolved against the party moving for summary judgment. See *GRAMS V. BOSS*, 97 WIS. 2D. 332, 338-9, 294 N.W. 2D 473 (1980) and *BALELE V. DOT*, 00-0044-PC-ER, 10/23/01. If the moving party makes a prima facie case for summary judgment, the non-moving party must show there are material facts in dispute which entitle the non-moving party to a hearing. *LAMBRECHT V. ESTATE OF KACZMARCZYK*, 2001 WI 25, 241 Wis. 2D 804, 623 N.W. 2D 751 (2001). If the moving party fails to make out a prima facie case for summary judgment, there is no need to go further. *SCHMITZ V. FIRSTAR BANK MILWAUKEE*, 2003 WI 21, 260 Wis. 2D 24 (2003). The non-moving party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. *BALALE, ID*, citing *MOULAS V. PBC PROD.* 213 Wis. 2D 406, 410-11, 570 N.W. 2D 739 (Ct. App. 1997). If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. *BALELE, ID.*, citing *TRANSPORTATION INS. CO. V. HUNTZIGER CONST. CO.*, 179 Wis. 2D 281, 290-92, 507 N.W. 2D 136 (Ct. App. 1993).

SCOTT, p. 6.

Finally, the Commission said that it would consider the following factors in ruling on a motion for summary judgment:

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* For example, subjective intent is typically difficult to resolve without a hearing, whereas legal issues based on disputed or historical facts typically could be resolved without the need for a hearing.

2. *Whether a particular Appellant could be expected to have difficulty responding to a dispositive motion.* For example, an unrepresented Appellant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as an Appellant either represented by counsel or appearing pro se but with extensive experience litigating in this forum.
3. *Whether the Appellant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* For example, an unrepresented Appellant who either has had no opportunity for discovery or who could not be expected to use the discovery process may be unable to respond effectively to an assertion by Respondent for which the facts and related documents are solely in Respondent's possession.
4. *Whether the Appellant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists, use of a summary procedure to evaluate his/her claims may be warranted before requiring the expenditure of resources for an evidentiary hearing.

Ibid.

Application of these factors here yields the following results. With regard to the first factor, it is noted that the ultimate issue to be decided herein is whether there was just cause for Thom's discharge. In making this call, the Commission considers the following three criteria: 1) whether the greater weight of credible evidence shows the appellant committed the conduct alleged by respondent in its letter of discipline; 2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline; and 3) whether the imposed discipline was excessive. *DEL FRATE V. DEPARTMENT OF CORRECTIONS, DEC. NO. 30795 (WERC, 2/04)*. For the purpose of ruling on the motions, the Examiner cannot say with absolute assurance that all these criteria for just cause have been established. In order to make that call, an evidentiary hearing is needed. Consequently, the factual issues raised in a discharge case are not susceptible to resolution on summary judgment. With regard to the other factors (i.e. factors 2, 3 and 4 above), it is noted that Thom is not an attorney and is not represented by counsel. Additionally, insofar as the record shows, there is no pattern of the Appellant engaging in repetitive and/or frivolous litigation. That being so, the above-noted factors preclude the Examiner from granting summary judgment to either party.

Accordingly, both parties' motions for summary judgment are denied. The appeal will proceed to hearing.

Dated at Madison, Wisconsin, this 26th day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

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Raleigh Jones, Examiner