

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL K. LANGWORTHY, Appellant,

vs.

SECRETARY, DEPARTMENT OF CORRECTIONS, Respondent.

Case 134
No. 70785
PA(adv)-203

Decision No. 33316-B

Appearances:

Michael K. Langworthy, appearing on his own behalf.

H. Elizabeth Kennebeck, Assistant Legal Counsel, Department of Corrections, P.O. Box 7925, Madison, Wisconsin, 53707-7925, appearing on behalf of the Department of Corrections.

DECISION AND ORDER

Michael K. Langworthy appeals the imposition of a disciplinary termination from his employment with the Wisconsin Department of Corrections arising from sexual harassment he purportedly committed toward another DOC employee.

The parties agreed to the following statement of the issue:

Whether there was just cause for the termination of Michael K. Langworthy that the Department of Corrections imposed by letter dated April 21, 2011.

The matter was heard on November 8, 2011, before Hearing Examiner Stuart D. Levitan of the Commission's staff. The parties submitted their written arguments by January 26, 2012. The Examiner issued a proposed decision on April 10, 2012. No objections were filed by the due date of May 10, 2012. Aside from deletion of Findings and portions of the Memorandum that were not essential, the Commission has adopted the proposed decision.

Dec. No. 33316-B

The Commission hereby makes the following

FINDINGS OF FACT

1. Respondent Department of Corrections (DOC) is an agency of the State of Wisconsin with statutory authority to manage correctional facilities. Among its facilities is the Taycheedah Correctional Institution (TCI), a maximum and medium security facility for incarcerated females, located in Fond du Lac, Wisconsin.

2. Michael K. Langworthy began employment as a Supervising Officer 2 (Captain) at TCI in August, 2006, and was serving as 1st/2nd shift Relief Captain in November, 2010. The primary activity of a Supervising Officer 2 is to provide supervision and guidance to security staff. Prior to his termination, Langworthy had been disciplined four times, including a ten-day suspension in April, 2010, and a 15-day suspension in October, 2010 for conduct similar to that which led to his termination.

3. CS, a female, began work as an Officer at TCI on July 5, 2010, following seven weeks of new officer training. CS was assigned 2nd shift, where her primary supervisors were the Appellant, Capt. Ann Boyle and Lt. Mike Gierach.

4. On April 21, 2011, TCI Warden Deanne Schaub sent Langworthy a letter, which read, in part:

This letter will serve as official notification that you are being terminated from your employment as a Supervising Officer II, effective immediately.

This action is being taken because you are in violation of Departmental Work Rule:

Work Rule #6 (Category B Violation) – Falsifying records, knowingly giving false information, or knowingly permitting, encouraging or directing others to do so. Failing to provide truthful, accurate and complete information when required.

Work Rule #13 (Category B Violation) – “intimidating, interfering with, harassing (including sexual or racial harassment) demeaning, or using abusive language in dealing with others”

Specifically, you have been found to have engaged in the following misconduct:

- On November 22, 2010 you asked a female correctional officer who was on vigil duty at Mercy Medical Center in Oshkosh what color her underwear was and whether she was wearing a thong. The female officer had called the institution to speak with a supervisor to obtain information on how to obtain relief to use the restroom. These comments and questions were not welcome and were offensive.

- On November 22, 2010, you also failed to give the female officer direction on how to properly handle the situation of needing relief to use the restroom, instead you commented about hospital staff bringing her a port-a-potty.
- During the investigation into the situation which occurred on November 22, 2010, you stated that the female officer was laughing during the telephone conversation. In fact, the officer was not. The officer was very serious during the conversation. She was concerned about how to maintain the security vigil but at the same time how to obtain relief to use the restroom.
- On November 22, 2010 you also made an inappropriate comment to the Lieutenant who was working the evening when the female officer called. When the lieutenant was on the telephone with the female officer trying to help her, you told the lieutenant to quit flirting with the female officer.
- During the investigation into the November 22, 2010 situation, you denied telling the lieutenant to stop flirting with the female officer. However, the evidence supports the fact that you did make the inappropriate statement.
- In addition, it has been determined that you began sexually harassing the female correctional officer shortly after she started working at Taycheedah Correctional Institution as an original probationary employee. She indicated your actions and comments which were flirtatious and sexual made her uncomfortable and she attempted to keep her distance from you and the unwelcomed advances. Examples of your harassing behavior include:
 - You asked you asked the female officer out several times. . When you asked her out, she responded, “I’ll probably be forced for overtime.” Your response was that you could get her out of the force.
 - On one occasion while assisting her on a computer, you touched her thigh.
 - When shaking hands with the female officer, you held on to her hand excessively longer than normal hand shakes.

. . .

5. Langworthy engaged in the misconduct alleged in his termination letter of April 21, 2011.

6. Langworthy's misconduct violated Work Rule #6 and #13 and impaired the Respondent's operations.

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

CONCLUSIONS OF LAW

1. The Commission has the authority to review this matter pursuant to Sec. 230.44(1)(c), Stats.

2. Respondent Department of Corrections has the burden to establish just cause to terminate Langworthy.

3. Respondent Department of Corrections has sustained that burden.

4. There was just cause to terminate Appellant Michael Langworthy.

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

ORDER¹

Respondent's action, as set forth in its letter of April 21, 2011 to terminate Appellant is upheld and this appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of July, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

¹ Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Wisconsin Department of Corrections (Langworthy)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter is before the Commission as an appeal of the decision to terminate Appellant from his position as a Supervising Officer 2 at Taycheedah Correctional Institution.

In Department of Corrections (Del Frate), Dec. No. 30795 (WERC, 2/04), we identified the legal standard to apply when analyzing an appeal of disciplinary action under Sec. 230.44(1)(c), Stats.:

On appeal of a disciplinary matter the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. Section 230.34, Stats., requires . . . just cause. The Courts have equated this to proof to a reasonable certainty by the greater weight or clear preponderance of the evidence. REINKE V. PERSONNEL BOARD, [53] WIS. 2D 123 (1973); HOGOBOOM V. WIS. PERS. COMM., DANE COUNTY CIRCUIT COURT, 81-CV 5669, 4/23/84; JACKSON V. STATE PERSONNEL BOARD, DANE COUNTY CIRCUIT COURT, 164-086, 2/26/79. The underlying questions are: 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. MITCHELL V. DNR, 83-0228-PC, 8/30/84. In considering the severity of the discipline to be imposed, the Commission must consider, at a minimum, the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to have a tendency to impair the employer's operation, and the employee's prior work record with the respondent. SAFRANSKY V. PERSONNEL BOARD, 62 WIS. 2D 464 (1974), BARDEN V. UW. 82-237-PC, 6/9/83.

The April 21, 2011 letter that terminated Langworthy alleged he engaged in several acts of sexual harassment and other inappropriate acts, and that he provided false or incomplete information during an official investigation.

1. Did the alleged misconduct occur?

The Commission's role in a civil service appeal arising from a disciplinary action is to hear the matter *de novo*, rather than reviewing the employer's investigation of the alleged misconduct. The initial question before us, therefore, is whether the respondent agency established at hearing that the appellant engaged in the conduct complained of. DOC (Molnar), Dec. No. 32336-C (WERC, 1/12).

The letter of termination that is the subject of this appeal alleges at least nine distinct acts or statements which DOC considered to constitute violations of Work Rules #6 and #13.

As with most controversies concerning purported sexual harassment, this case largely turns on determinations of witness credibility. DOC's case relies largely, but not exclusively, on the testimony of CS, the target of the alleged harassment, buttressed by corroborating witnesses whose testimony supports the assertion that the alleged misconduct actually occurred. Langworthy's defense, on the other hand, is based exclusively on his own testimony and attacks on the credibility of Respondent's witnesses, particularly CS, whom he alleges lied repeatedly under oath. Langworthy also asserted that CS "changed her testimony on numerous occasions," but provides no examples or citations to the record.

Langworthy attempts to tie CS's complaint about his behavior with her stated desire to transfer out of TCI, which he asserts was the "probable" reason for what he described as "these false allegations." We agree that CS had voiced unhappiness with her working conditions at TCI, and openly stated her hope of transferring to another institution upon passing probation and attaining permanent status in class. However, we fail to understand how her complaint about Langworthy's behavior could assist in that effort.

Langworthy also alludes to union animus against him, which he asserts was also at the root of CS's complaint. However, there is no evidence other than Langworthy's own unsubstantiated assertion to validate union animus against him. And while animus towards a supervisor is not unknown in the workplace, CS testified credibly that she was neither involved with, nor particularly supportive of, her union, and that she never intentionally discussed this matter with union members or leaders. Thus, whether or not the relevant labor organization, either institutionally or by its individual members, bore animus toward Langworthy does not affect our assessment of CS's credibility.

Indeed, Langworthy's attempt to impeach CS's credibility by challenging her supposed motives falters in light of the fact that she had not even intended to make a formal complaint about this matter. The record shows that the incident reports filed by Ofc. Tilleman and Capt. Boyle, not any action by CS, started the investigation and that CS deliberately did not file an incident report, even after Tilleman told her that she should. Moreover, at her initial interview into this incident, CS told investigators she had "spent all day feeling bad about telling this about Langworthy," but then realized "that I needed to do this or I couldn't continue to work for the State."

In addition to CS's credible testimony at hearing, the contemporaneous evidence supports her version of events. Lt. Gierach testified that Langworthy indeed told him to stop flirting with her, which Langworthy had denied doing. The sleep study nurse testified that CS was serious and concerned while on the phone, and was not light-hearted and playful, as Langworthy insisted she was. At least four colleagues - Tilleman, Gierach, Boyle and Rogers - testified and/or wrote formal reports attesting to how upset CS was on her return from the sleep study, and the specifics of her comments about Langworthy's behavior.

In contrast, Langworthy's defense was simply to deny each and every allegation.

The greater weight of the credible evidence clearly establishes that Langworthy committed the conduct alleged in the letter terminating him.

2. Was some form of discipline warranted?

Having determined that the Appellant engaged in the conduct described in the letter terminating him, the second step in the analysis is to determine whether this conduct warranted any discipline. We find the greater weight of the evidence establishes cause to impose some level of discipline.

Langworthy was a Captain, with significant authority over all subordinate personnel, especially probationary employees such as CS, whose job security he effectively controlled. Langworthy was also responsible for ensuring compliance with various state and federal laws protecting civil rights and equal opportunity, especially those protecting staff and inmates from harassment. DOC had published valid directives and work rules prohibiting employees from giving false or incomplete information and from engaging in sexual harassment.

Clearly, any employee who committed the degree of sexual harassment which Langworthy committed would be subject to discipline in the modern workplace. Such conduct is especially inappropriate when the workplace is a correctional institution for women, and the supervisor effectively has the power to grant or deny permanent status to the target of the harassment.

3. Was termination excessive discipline?

Langworthy was fully aware that Respondent took such matters very seriously having been suspended on two prior occasions for harassment; required to attend harassment training; and cautioned that further work rule violations would result in additional discipline up to and including termination.

Langworthy also gave false and misleading answers during the internal investigation arising out of the events of November 22, 2010. By so doing, he violated Work Rule #6.

Our predecessor agency, the Personnel Commission, consistently held that once just cause for the imposition of discipline had been found, it would not modify the actual discipline unless it was excessive. Reimer v. DHSS, 92-0781-PC, (Wis. Pers. Comm'n. Feb. 2, 1994), Jacobs v. DOC, Case No. 94-0158-PC Wis. Pers. Comm'n. May 15, 1995).

Given the continuing nature of Langworthy's offenses, the severity of his misconduct, his abuse of supervisory authority, the two lengthy suspensions for related offenses, and the

employer's legitimate and proper need for a workplace free of harassment, we do not find the Respondent's decision to terminate to be excessive. Accordingly, we have upheld DOC's decision to terminate Appellant and dismissed the appeal.

Dated at Madison, Wisconsin, this 10th day of July, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner