

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEVIN M. KELSAY, Appellant,

vs.

WISCONSIN STATE PUBLIC DEFENDERS OFFICE, Respondent.

Case ID: 501.0002

Case Type: PA

DECISION NO. 37782

Appearances:

Kevin M. Kelsay, 5435 West Forest Home Avenue #3, Milwaukee, Wisconsin, appearing on his own behalf.

Cara J. Larson, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the Wisconsin State Public Defenders Office.

DECISION AND ORDER

On December 11, 2017, Kevin M. Kelsay filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause by the Wisconsin State Public Defenders Office. Due to an accident, Kelsay was unable to attend a January 16, 2018 hearing regarding the appeal. Hearings were ultimately held on August 14 and August 29, 2018, in Milwaukee, Wisconsin, by Examiner Peter G. Davis. The parties made oral argument at the conclusion of the August 29, 2018 hearing, and a transcript of the hearings was received on September 5, 2018.

On November 16, 2018, Examiner Peter G. Davis issued a Proposed Decision and Order rejecting the one-day suspension of Kevin Kelsay by the Wisconsin State Public Defenders Office. No objections were filed and the matter became ripe for Commission consideration on November 23, 2018.

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

FINDINGS OF FACT

1. Kevin M. Kelsay is employed by the Wisconsin State Public Defenders Office as a Legal Secretary and had permanent status in class when he was suspended.
2. The Wisconsin State Public Defenders Office (SPD) is a State agency.

3. Kelsay was suspended by the SPD for one day for allegedly encouraging another employee to give false information during that employee's disciplinary investigation and repeatedly providing contradictory information during his own disciplinary investigation.

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 § 230.44 (1)(c), Stats.

2. The Wisconsin State Public Defenders Office did not meet its burden of proof that Kelsay encouraged another employee to give false information during that employee's disciplinary investigation or repeatedly provided contradictory information during his own disciplinary investigation.

3. The Wisconsin State Public Defenders Office did not have just cause within the meaning of § 230.34(1)(a), Stats., to suspend Kevin M. Kelsay for one day.

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

ORDER

The suspension of Kevin M. Kelsay by the Wisconsin State Public Defenders Office is rejected and Kelsay shall be made whole.

Dated at Madison, Wisconsin, this 12th day of December, 2018.

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.

Kevin M. Kelsay had permanent status in class at the time of his one-day suspension and his appeal alleges that the suspension was not based on just cause.

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

It is undisputed that a citizen called the SPD complaining about a letter received from an SPD employee (R.) that contained information about a citizen's criminal record. The citizen also expressed concern that R. had improperly accessed other information about the citizen. SPD began an investigation and interviewed R. During that initial interview, R. denied having any knowledge as to how the criminal record information had been obtained. After her initial interview, R. talked to Kelsay. R. subsequently told SPD that she had asked SPD employee W. to provide her with the information. Shortly thereafter, R. resigned in lieu of being discharged during her probationary period.

Relying on information provided by R., SPD continued its investigation and concluded that employee W. had improperly used SPD resources to obtain information about the citizen. W. was suspended for one day. During the processing of the suspension grievance W. filed, SPD learned that W. had acted in response to an email request from Kelsay to obtain the citizen's criminal record and had believed the request to be in the context of an SPD case. SPD then withdrew W.'s suspension and turned its attention to Kelsay. When Kelsay learned he was to be interviewed by SPD, he contacted R.

Whether Kelsay committed any misconduct that warranted a one-day suspension turns on what he suggested to R. during the SPD investigation into R.'s conduct. After initially denying any knowledge, R. subsequently told SPD that she asked W. to obtain the citizen's criminal record. R. asserts that she did so at Kelsay's suggestion. SPD relies on R.'s version of events as the basis for its contention that R.'s omission of a reference to Kelsay's role was a result of her interaction with Kelsay. Kelsay contends that his advice to R. was simply to be truthful.¹

¹ Kelsay's suspension also references allegedly providing contradictory information regarding the nature of his relationship with R. and the timing of his contacts with her. Both Kelsay and R. testified that their relationship was

It is undisputed that Kelsay sent coworker W. an email on January 30, 2017, using SPD email that asked W. to conduct a PACER search as follows: “Can you find out and download any doc’s (within reason of course) re: an EDWI criminal case?” The email identified the name of the citizen whose criminal record was being requested and the month and date of the citizen’s birth. The email concluded by stating “This request came from (coworker R.) but I thought it would be easier to just send it along.” W. performed the requested search and provided Kelsay and R. with the result.

R. testified that she had discussed her concerns about the citizen’s criminal record with Kelsay but denies asking him to take any action. She contends she already knew of the criminal record and speculates that Kelsay’s request to W. was a reflection of his kind, curious but nosey nature. Nonetheless, R. admits being aware of Kelsay’s request to W. and W.’s response. As reflected in the email content above, Kelsay asserts that R. asked for his help.

While once on friendly terms, Kelsay and R. are now hostile toward each other due to their involvement in this matter. Their dislike for each other potentially gives each a motive to be less than truthful in their testimony. In the classic analysis, Kelsay has more incentive to lie than does R., but it is noted that R.’s interest in clearing her name (see her August 31, 2017 email to SPD) also makes her a less than disinterested witness. Both of them testified in a credible manner in terms of their demeanor and both versions of the events are plausible.

Because SPD did not begin to investigate Kelsay until late August 2017, it seems clear that R. did not mention Kelsay’s involvement in seeking the citizen’s information during her May 2017 investigatory interviews.² The question posed here is why? Was it Kelsay’s suggestion that she not do so as SPD asserts? Or did she voluntarily choose to only identify W. – who in fact performed the search – after Kelsay (as he asserts) told her to just tell the truth? There is some documentary evidence and witness testimony that is potentially helpful when attempting to answer this question.

When Kelsay sought W.’s help, he had the partial birthdate of the citizen. It seems unlikely that Kelsay would have known that information unless R. provided it which, in turn, makes it appear more likely that R. (contrary to her testimony at hearing) asked for Kelsay’s help.

One day after Kelsay asked W. for help, R. sent Kelsay a text that read “Thank you. You’re awesome!” R. denies that the text related to Kelsay’s help but provided no alternative explanation. The most reasonable inference to be drawn from the timing and content of the text is that it related to Kelsay’s help and is again supportive of a conclusion that R. (contrary to her testimony at hearing) asked for Kelsay’s help.

limited to being office coworker friends/acquaintances. While some the texts exchanged by R. and Kelsay create an inference of a stronger friendship that extended beyond the workplace, the testimony of R. and Kelsay persuades the Commission otherwise. Further, review of the entire record does not establish that Kelsay repeatedly provided any significant contradictory information. Instead, it appears that conflicting interpretations of the word “associate” led to a misunderstanding. Therefore, Kelsay is found to be have been truthful as to the nature of his relationship with R. and the timing of his contacts with her. Thus, this partial basis for the suspension is rejected. However, the content of the texts R. and Kelsay exchanged remains fair game for consideration when determining what Kelsay suggested to R. during the investigation.

² As discussed below, there is dubious testimony from R. that she told her SPD supervisor of Kelsay’s involvement shortly before she resigned in May 2017.

R. testified that after she initially lied to SPD about how the request for citizen information came about, she then told her SPD supervisor about Kelsay's involvement on or about May 18, 2017. The SPD investigation did not turn to Kelsay until the end of August 2017. The SPD supervisor did not testify. If R. told SPD in May that Kelsay took it upon himself to look into the citizen's background, why wouldn't SPD have immediately begun an investigation in Kelsay? While an SPD witness did testify that an SPD supervisor subsequently confirmed that such a conversation with R. occurred, it seems unlikely that a supervisor would not have contemporaneously passed this information on to other SPD managers. The lag in timing casts doubt on R.'s testimony that such a May 2017 conversation occurred.

The letter R. wrote to the citizen is not in the record, but it seems clear it was written after R. received information with Kelsay's assistance. If, as she testified, R. knew all along that the citizen had a criminal record, she presumably could have written the letter at any time, including prior to Kelsay's action. The timing of the letter casts doubts on R.'s testimony.

The record contains the following May 18, 2017 text messages from R. to Kelsay and Kelsay to R. during SPD's investigation of R.

1248	R.	They want to pull me in the office again. I don't have time to talk to [W.] Can you do it	5/18/2017 11:13	Received
1249	R.	(1/2) They saw that there was a search done. They asked me how that happened. I told them exactly what you told me to say and they just said we'll see what HR	5/18/2017 11:52	Received
1250	R.	(2/2) has to say I said so they decide if I get fired or not and Jan said I don't think that's gunna happen. So idk.	5/18/2017 11:52	Received
1251	R.	But where is Mark. He's not around.	5/18/2017 11:53	Received
1252	R.	I wasn't able to tell Mark. Because Jan asked me to go in his office in 20 min	5/18/2017 11:54	Received
1253	R.	And Jenna was teaching me to transcribe.	5/18/2017 11:54	Received
1254	Me	Let's be clear ... I advised that if you messed up in any way to fess up and that being honest is the most important thing. If you forgot something so be it. Shouldn't be a big deal.	5/18/2017 12:13	Sent

There are a variety of inferences that can be drawn from these texts. Clearly, R. says she told SPD what Kelsay advised her to say. Was that advice to omit Kelsay's role or to explain exactly what did happen? Why the need to talk to W. by either R. or Kelsay? Given W.'s actual and easily discoverable involvement in the matter, the texts can be viewed as no more than an effort to warn him that an investigation into his actions was likely to occur. Given the existence of the Kelsay email to W., Kelsay would have known his involvement would inevitably be discovered – so why suggest R. not mention it?

In light of all the foregoing, the Commission concludes that there simply is not enough credible evidence to support a finding that Kelsay suggested that R. be less than truthful in May 2017. Therefore, the suspension is rejected.

Dated at Madison, Wisconsin, this 12th day of December, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman