

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL WOODY, Appellant,

v.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0241

Case Type: PA

DECISION NO. 37786-A

Appearances:

Sean Daley, Field Representative, AFSCME Council 32, N600 Rusk Road, Watertown, Wisconsin, and Brian E. Pawlak, Attorney, P.O. Box 511653, Milwaukee, Wisconsin, appearing on behalf of Michael Woody.

Cara J. Larson, 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 March 23, 2018, Michael Woody filed an appeal with the Wisconsin Employment Relations Commission pursuant to Wis. Stat. § 230.45(1)(c), asserting that the State of Wisconsin Department of Corrections abused its discretion by the manner in which it applied the terms of a rule/policy to Woody.

On October 9, 2018, the State filed a motion to dismiss arguing that the content of written agency rules cannot be grieved and thus that the Commission does not have authority to rule on the merits of the appeal in its role as the final step arbiter in the State employee grievance procedure. On November 21, 2018, the Commission issued a Decision and Order denying the motion based on its view that it has jurisdiction to determine if the State abused its discretion when applying a policy.

A hearing was held on February 13, 2019 in Madison, Wisconsin before Commission Examiner Peter G. Davis. A supplemental telephone hearing was held by Examiner Davis on March 29, 2019. On September 27, 2019, Woody and the State filed written argument. On October 11, 2019, Woody filed a reply brief.

Thereafter, the appeal was held in abeyance while the parties engaged in unsuccessful attempts to reach a settlement and to allow for submission of a request for attorney fees and costs in a parallel appeal filed by Melissa Westendorf. Submission of matters related to attorney fees and costs in the Westendorf matter was completed on September 28, 2020.

On November 4, 2020, Examiner Davis issued a Proposed Decision and Order. On December 4, 2020, the State filed objections and on December 7, 2020 Woody did the same. On December 15, 2020, Woody filed a response to the State's objections.

Having considered the matter, the Commission makes and issues the following:

FINDINGS OF FACT

1. Since 1997, Michael Woody, herein Woody, has been employed by the State of Wisconsin Department of Corrections (DOC) as a Psychologist. Since 2005, he has been assigned to the DOC's Chapter 980 Forensic Evaluation Unit conducting evaluations of sex offenders completing their prison sentences to determine if they meet the criteria for civil commitment as sexually violent persons under Wisconsin law.

2. From 1995 to the present, DOC Executive Directive 26 and its 2018 successor DOC Human Resources Policy 200.30.013 have governed the circumstances under which a DOC employee can maintain outside employment. Under the terms of Executive Directive 26 and its successor, Woody has maintained an approved outside private practice as a psychologist since 2000.

3. Among other matters, DOC Human Resources Policy 200.30.013 specifies:

Employees of the DOC shall not accept employment or enter into a business relationship with . . . agent of an adult or juvenile inmate/offender

Employees shall not accept employment as a provider of direct professional human services (e.g. counseling and psychological services, job placement/development, etc.) to any juvenile or adult inmate or offender as defined above.

4. In December 2017, for the first time, DOC's approval of Woody's outside employment included the limitation of "So Long as Individuals Served Are Not under DOC Supervision." DOC does not place that same limitation on all of its Chapter 980 Psychologists who engage in outside employment.

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 under Wis. Stat. § 230.45(1)(c) to determine if the State of Wisconsin Department of Corrections abused its discretion when it imposed a limitation on Michael Woody's private practice.¹

2. The State of Wisconsin Department of Corrections abused its discretion as to the limitation on Michael Woody's private practice.

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

ORDER²

1. The State of Wisconsin Department of Corrections shall immediately rescind the December 2017 limitation on Michael Woody's private practice.

2. The State of Wisconsin Department of Corrections shall make Michael Woody whole for all outside employment earnings lost since February 2, 2018 due to the December 2017 limitation.

Issued at Madison, Wisconsin, this 10th day of February, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹In its December 4, 2020 objections, the State for the first time cites to a 2014 Commission decision in *Wilhorn v. DNR*, Dec. No. 35044 (WERC, 6/14) for the proposition that the Commission lacks jurisdiction. As Woody notes in his response, this decision contains no legal analysis. Further, current Commission Chair James Daley was not a member of the Commission at that time. Thus, while the Commission acknowledges the value of generally following its own prior precedent, it declines to do so here given the factors noted above.

²In its December 5, 2020 objections, Woody encourages the Commission to broaden the scope of the Order to prohibit any future application of the outside employment policy to Woody that is allowable under the Commission's decision, unless the policy has been applied and enforced as to all DOC employees-not just DOC employed psychologists. While it seems highly unlikely that DOC could justify application of the policy to Woody and other DOC psychologists but not for instance to DOC employed psychiatrists, the Commission concludes the scope of the record does not allow for such an expansion. In this regard, the Commission will not be considering the affidavit filed on December 15, 2020 by a DOC psychiatrist. Said affidavit could have been but was not submitted prior to the close of the evidentiary record.

MEMORANDUM ACCOMPANYING DECISION AND ORDER

The issue in this matter is whether Chapter 980 Psychologist Michael Woody has met his burden of proof to establish that the State of Wisconsin Department of Corrections abused its discretion when it imposed a limitation on his private practice as a forensic psychologist.

An “abuse of discretion” has been defined by the Commission as an exercise of discretion “to an end or purpose not justified by and clearly against reason and evidence.” *See Moeller-Bunker v. DWD*, Dec. No. 36786 (WERC, 5/17).

Wisconsin Admin. Code § ER MRS 24.045 requires that State agencies establish guidelines regarding the outside employment of State employees. The Department of Corrections (DOC) guidelines in effect since 1995 allowed Woody to maintain a private practice since 2000. In December 2017, for the first time, DOC imposed a limitation on that private practice prohibiting him from providing his services to anyone under DOC supervision. The limitation was nonsensically triggered by DOC ire at the truthful and non-psychological testimony of another DOC Chapter 980 psychologist to the effect that persons between the ages of 18-20 are not minors.

The limitation on Woody’s private practice is not applied to all DOC Chapter 980 psychologists. The DOC has not presented any “end or purpose” as to why that is so. This disparate treatment qualifies as an “abuse of discretion.”

Even if the limitation were applied to all DOC Chapter 980 psychologists, the outside employment guidelines in question would not be applicable to portions of Woody’s practice as a forensic psychologist. As firmly established by the record but seemingly ignored or misunderstood by DOC, a forensic psychologist does not provide “direct professional human services” prohibited by the guidelines. There is no reasonable interpretation of that portion of the guidelines that would extend to forensic services and thus it is inapplicable to the service Woody wishes to provide. However, another portion of the guidelines in effect since March 2018 does prohibit providing services to the “agent of an adult or juvenile inmate/offender.”³ If DOC were to apply Woody’s outside employment limitation to all Chapter 980 Psychologists, this portion of the guidelines would validly prohibit Woody from providing services to attorneys (such as Public Defenders) or others who work as an agent of an “adult or juvenile inmate/offender.” He could continue to provide forensic psychological services to prosecutors and the courts.

As to a remedy for the DOC abuse of discretion, the only limitation on remedy found in the Chapter 430 of the State Employee Grievance Procedure is at Section 430.014, which limits retroactive relief to 14 days prior to the filing of the grievance at the first step. Woody filed February 16, 2018, so relief begins February 2, 2018.

³Woody argues that even this restriction is invalid because the Chapter 980 psychologists employed by the State of Wisconsin Department of Human Services (DHS) do not have a similar restriction. However, at least as to the appearance of a conflict of interest, the evidence establishes a plausible basis for a distinction between the outside employment guidelines for DOC and DHS.

Issued at Madison, Wisconsin, this 10th day of February, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman