

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JARED FRANKE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0273

Case Type: PA

DECISION NO. 37807-B

Appearances:

Sean Daley, Field Representative, AFSCME Council 32, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of Jared Franke.

Cara J. Larson, Attorney, Department of Administration, 101 East 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 5, 2018, Jared Franke filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Peter G. Davis. A hearing was held on January 8, 2019, in Green Bay, Wisconsin. The parties made oral argument on January 15, 2019, and a stenographic transcript of the hearing was electronically received January 22, 2019.

On February 13, 2019, Examiner Davis issued a Proposed Decision and Order modifying the discharge to a ten-day suspension. DOC filed objections on February 18, 2019, and Franke filed a response on February 19, 2019. On February 26, 2019, Examiner Davis was given final authority to issue the Commission's decision pursuant to § 227.46(3)(a), Stats.

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

FINDINGS OF FACT

1. Jared Franke was employed as a correctional officer by the State of Wisconsin Department of Corrections (DOC) and had permanent status in class at the time of his discharge on September 28, 2018.

2. On July 13, 2018, Franke unreasonably used limited force on an inmate who was not posing a physical threat.

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 to review this matter pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Corrections did not have just cause, within the meaning of § 230.34(1)(a), Stats., to discharge Jared Franke.

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

ORDER

The discharge of Jared Franke by the State of Wisconsin Department of Corrections is modified to a ten-day suspension.¹

Signed at the City of Madison, Wisconsin, this 26th day of February, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis for the Commission

¹ When the discipline imposed is modified pursuant to the Commission's authority under § 230.44(4)(c), Stats., the Commission is not bound to follow any disciplinary progression established by the employing agency. *Wolf v. DOC*, Dec. No. 36317 (WERC, 5/16). Rather, as part of the exercise of its § 230.44(1)(c), Stats. just cause jurisdiction, the Commission has discretion to determine the appropriate level of discipline.

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.

Jared Franke had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that Franke 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 Franke used force against an inmate. The dispute is whether Franke could reasonably have concluded the inmate posed a safety threat. As reflected in the record and discussed in the Commission's decision in *Grabowski v. DOC*, Dec. No. 36756 (WERC, 12/16), there is a margin of error when force is used. Even a "potentially erroneous" employee belief regarding the need for force may be reasonable and thus not subject to discipline.

Fundamental to deciding whether Franke reasonably believed his safety was threatened is a determination of whether the inmate was moving toward or away from him when force was used. Franke testified the inmate was moving toward him in a threatening manner. The inmate and a correctional officer testified the inmate was moving away from Franke. The State concedes that if Franke's version of events is found to be correct, no discipline would have been appropriate.

The credible testimony of the correctional officer warrants a conclusion that the inmate was moving away from Franke. Unlike Franke and the inmate, the correctional officer had no reason to be less than truthful. While Franke raises a question as to whether the correctional officer observed the interaction in question, even he acknowledged the officer's general presence at the scene at page 2 of his August 1, 2018 Use of Force Interview. Thus, Franke's version of events is rejected and cannot form the basis for a conclusion that he acted reasonably.

To a lesser extent, Franke argues that in the context of a maximum-security prison and the specific interactions between Franke and the inmate which occurred prior to the incident in question, his use of force was reasonable even if the inmate was moving away. There is some support in the record for that proposition. Green Bay Correctional houses potentially dangerous inmates. There have been sporadic instances in which employees have been attacked by inmates who are behind them. The inmate in question had threatened to "beat your ass" earlier in the day and had approached Franke moments before the use of force in a manner that caused Franke to

pull his pepper spray and order the inmate to retreat. There is the additional overlay of Franke's PTSD diagnosis following an assault by an inmate roughly ten months prior. Nonetheless, the totality of the record persuades the Commission that Franke's use of force was not reasonable.²

Having found that Franke's use of force was not reasonable, the question becomes whether his misconduct establishes just cause for discharge. It does not. The State/DOC does not have a zero-tolerance policy as to unreasonable use of force as confirmed by the wide variety of disciplinary responses to use of force misconduct that are part of the record. The inmate was not injured in any meaningful way as a consequence of Franke's actions. Green Bay Correctional's prior effort to discharge Franke following the previously referenced incident in which he was attacked and injured by an inmate (an effort that was rejected by other State/DOC officials and ultimately produced only a non-disciplinary letter of instruction in Franke's file) suggests some personal animus toward Franke that improperly influenced the level of discipline imposed here. On balance, the Commission is persuaded that a ten-day suspension is the correct just cause discipline for Franke's misconduct. Therefore, Franke shall receive a ten-day suspension and shall otherwise be reinstated immediately and made whole in all respects.

Signed at the City of Madison, Wisconsin, this 26th day of February, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis for the Commission

² While the primary justification for Franke's discharge is the use of force, the discharge letter also asserts he was not truthful during the investigation. While Franke's version of events has been rejected, the record as a whole persuades the Commission that Franke believed in good faith that his version of events was accurate. Thus, the improper use of force is the Commission's analytical focus.