

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEVIN WAITE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0274

Case Type: PA

DECISION NO. 37912

Appearances:

Kevin Waite, 3469 Nelson Road, Oshkosh, Wisconsin, appearing on his own behalf.

Cara Larson, 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 November 8, 2018, Kevin Waite filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on January 11, 2019, in Oshkosh, Wisconsin. The parties made oral arguments at the hearing's conclusion.

On February 15, 2019, Examiner Raleigh Jones issued a Proposed Decision and Order affirming the one-day suspension of Kevin Waite by the State of Wisconsin Department of Corrections. Waite filed objections on February 20, 2019. The State did not respond and the matter became ripe for issuance of a Commission decision on February 26, 2019.

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

FINDINGS OF FACT

1. Kevin Waite is employed as a correctional sergeant at the Winnebago Correctional Center (WCC) in Winnebago, Wisconsin. He had permanent status in class at the time of his suspension.

2. One of Waite's work tasks is to complete inmate counts during his shift. On June 17 and 18, 2018, Waite counted two inmates as being present at WCC when those inmates were not present, but had escaped during his shift.

3. Waite was suspended for one day for doing that.

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 had just cause, within the meaning of § 230.34(1)(a), Stats., to suspend Kevin Waite 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 one-day suspension of Kevin Waite by the State of Wisconsin Department of Corrections is affirmed.

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

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

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

On June 17 and 18, 2018, Waite was on duty as the third shift control sergeant at WCC. One of his work tasks is to complete inmate counts during his shift. He completed the census and formal inmate counts during his shift at approximately 10:00 p.m., 11:00 p.m., 12:00 a.m., 1:00 a.m., 1:30 a.m., 3:00 a.m., 4:00 a.m., and 5:00 a.m. DOC has a policy that says before an inmate is counted as being present, the staffer must see “a live, breathing human body before counting any inmate.” Said another way, before a staffer counts an inmate as being present, the staffer must see “flesh and physical movements.” The staffer who physically counts the inmates is then supposed to accurately record the count. When the staffer conducts an inmate count, they are supposed to take a clipboard and a count sheet with them. Waite did not do that (i.e., take a clipboard and count sheet with him when he performed the inmate count on the day in question). He should have. When Waite did complete the paper form in question, he listed inmates AW and JH as being present and accounted for at WCC. The problem with that entry is this: those inmates were not present at WCC; they had escaped. The inmates’ escape was discovered about 9:00 a.m. on June 18, 2018.

It is Waite’s position the two inmates escaped after 6:00 a.m. on June 18, 2018. That time happens to coincide with when Waite’s shift ended. Thus, it is Waite’s position the inmates did not escape on his shift. However, Waite’s claim is undercut by the following evidence. First, both of the inmates who escaped were subsequently captured and reincarcerated. They both testified in this matter and both said they escaped from WCC between 11:00 p.m. and 1:00 a.m. While Waite attacks the inmates’ credibility, their testimony in this regard was buttressed by a DOC official who watched facility video footage from the night in question and who testified the video shows one of the inmates running away from the facility at 1:18 a.m. Second, the record shows after the

inmates left the WCC grounds, they were driven by an accomplice to the Madison area. Both said they arrived there about 4:00 a.m. Assuming they arrived there at that time, it simply was not possible for the two inmates to have escaped from WCC after 6:00 a.m. (as Waite averred). Consequently, Waite's contention that the inmates escaped from WCC after 6:00 a.m. is not supported.

It follows from that finding that the inmates escaped from WCC during Waite's shift. Consequently, Waite could not have seen "flesh" and "movement" for inmates AW and JH (as he averred he did) when he was conducting inmate counts in the latter part of his shift because those inmates were no longer present at WCC.

By counting those two inmates as being present during all the counts on his shift, when they had escaped, Waite failed to conduct a proper inmate count. As such, he was negligent in his work duties and violated his post orders. Waite's negligence put the safety of the community at risk. DOC has an obligation to ensure it is aware of the whereabouts of the inmates under its care and custody, and to ensure the safety and security of the communities where DOC inmates reside.

Based on the above, the Commission concludes that Waite's failure to conduct a proper inmate count constituted workplace misconduct warranting discipline. DOC therefore had just cause to discipline Waite for that misconduct.

Finally, the Commission finds the level of discipline imposed here (i.e. a one-day suspension) was not an excessive punishment. A one-day suspension is the first step in DOC's progressive discipline sequence. The record indicates DOC also imposed a one-day suspension on the first shift control sergeant who relieved Waite at 6:00 a.m. on December 18, 2018. He was also disciplined for failing to conduct a proper inmate count. That discipline was internally consistent with the discipline meted out to Waite. Under these circumstances, a one-day suspension passes muster with the Commission.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman