

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL FLEMING, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0279

Case Type: PA

DECISION NO. 37920

Appearances:

Sean Daley, AFSCME Wisconsin Council 32, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of Michael Fleming.

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 December 17, 2018, Michael Fleming 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 February 6, 2019, in Stevens Point, Wisconsin. The parties made oral arguments at the hearing's conclusion.

On March 6, 2019, Examiner Raleigh Jones issued a Proposed Decision and Order affirming the one-day suspension of Michael Fleming by the State of Wisconsin Department of Corrections. Fleming filed objections on March 11, 2019. The State did not respond, and the matter became ripe for Commission consideration on March 19, 2019.

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

FINDINGS OF FACT

1. Michael Fleming is employed as a correctional sergeant at the McNaughton Correctional Center (MCC) in Lake Tomahawk, Wisconsin. MCC is a small minimum-security facility. Fleming had permanent status in class at the time of his suspension.

2. On August 26, 2018, while he was on duty, Fleming found a three-inch paring knife on the facility's grounds in an outside cabinet. After finding the knife, Fleming put it in an evidence bag and placed it in a supervisor's mailbox. Two days later, he completed an incident report documenting the found knife.

3. After he found the knife referenced above, Fleming did not do the following: he did not notify the on-call supervisor about the knife before he left at the end of his shift; he did not document the found knife on the shift activity report; and he did not complete an incident report on the day he found the knife.

4. Fleming was suspended for one day for the inactions identified in Finding 3.

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 Michael Fleming 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 Michael Fleming by the State of Wisconsin Department of Corrections is affirmed.

Signed at the City of Madison, Wisconsin, this 2nd day of April, 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.

Michael Fleming 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 Fleming 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 August 26, 2018, while he was on duty conducting security rounds, Fleming found a 3-inch paring knife on MCC's grounds in an outside cabinet by Little Tomahawk Lake. Inmates fish in that lake. Because of that, it can fairly be inferred that inmates used the knife to clean fish. After Fleming found the knife, he put it in an evidence bag and then put it in a supervisor's mailbox. Fleming did not do the following: he did not notify the on-call supervisor about it; he did not document the found knife on the shift activity report; and he did not complete an incident report on that date. The next day (August 27), supervisors became aware of the knife which Fleming found. Fleming was off work that day, so a supervisor called Fleming at home to get more information relating to the found knife. That supervisor directed Fleming to complete an incident report when he returned to work. Following that phone call, MCC was placed on a shakedown where inmates and the facility were searched for more contraband. The next day (August 28), Fleming returned to work. He completed an incident report that day.

DOC faults Fleming for not doing three things after he found the knife on the day in question.

First, it faults Fleming for not notifying the on-call supervisor about the found knife before he left at the end of his shift. He asserts he did not need to do that because what he found was not serious enough to warrant that action. DOC disagrees with Fleming's judgment call in that respect. It is DOC's position that any knife in a prison constitutes contraband (even in a minimum-security facility like MCC), so Fleming should have reported it to the on-call supervisor. The Commission is hard-pressed to disagree, especially since Fleming is a lead worker who is tasked with reporting

such matters to the on-call supervisor. Consequently, the Commission finds that Fleming should have notified the on-call supervisor about the found knife before he left at the end of his shift.

Second, DOC faults Fleming for not documenting the found knife on the shift activity report (also known as the shift log). It is Fleming's view that he did not have to do that because it was not serious enough to warrant that action. DOC disagrees. In support of its position, it notes that DOC's Contraband policy requires all found contraband – including “sharps” (i.e. knives) – to be “logged and tracked.” The Commission concurs with DOC that per that policy, the knife Fleming found should have been recorded on the shift activity report.

Third, DOC finds fault with when Fleming completed his incident report documenting the matter. He completed his incident report on the day he returned to work (after being off work for one day). Thus, Fleming completed the incident report two days after the incident. It is Fleming's view that the incident report was timely filed. To support that premise, he notes that DOC's Use of Force policy expressly requires employees to complete an incident report before they leave the facility that day. Building on that, Fleming notes that DOC's Contraband policy does not contain such a requirement. Thus, the Contraband policy does not expressly say that employees must complete an incident report on the date of the incident. Notwithstanding that distinction between the two policies, it is DOC's position that Fleming should have nonetheless completed an incident report on the day of the incident – not two days later. The Commission finds that if DOC wants employees to complete an incident report on the day of the incident – like it does in use of force cases – it is certainly free to make that a requirement. However, that is not currently a requirement specified in DOC's Contraband policy. Since there is no requirement at present in DOC's Contraband policy that says employees must file an incident report on the same day as the incident occurs, the Commission concludes Fleming cannot fairly be faulted for completing the incident report when he did. Additionally, while Fleming offered to come into work on his day off (August 27) to complete the incident report, the supervisor told him he could do it the next day (August 28) when he returned to work. It follows from the foregoing that this charge against Fleming was not substantiated.

Fleming argues that disparate treatment occurred in his discipline; namely, that others have done the same and have not been punished. In support of the claim, he cites the actions of Sergeants Moon and Erickson. Both fail to be persuasive to the Commission in adequately establishing the basis for overturning the discipline imposed. In the case of Moon, his actions were not similar to those of Fleming. Moon was aware of Fleming finding the item in question, but he was not the one who found it. Being aware of another's discovery of contraband does not create an affirmative duty of reporting. Quite obviously, it is the duty of the individual who finds the item to go through the procedure which Fleming is being disciplined for not doing. Fleming's offering of Moon's conduct as being significantly similar as to create disparate treatment at best demonstrates an inability to understand what disparate treatment is comprised of. Fleming's offer of Erickson's actions is similarly suspect. Based on the testimony given during cross-examination of Captain Genske, there may have been another knife object which was not reported (and no one was disciplined for) approximately six to eight months prior to the incident discussed today.

Fleming states in his objection to the Examiner's proposed decision:

Captain Genske testified that he and Captain Berg did become aware of the knife found by Erickson and that they were aware he found it and were aware it was placed in the desk drawer by Erickson. Footnote 1, p.2.

This statement by Fleming is misleading and inaccurate taken in its best light. Genske testified he did not know who the staff member was that did not properly process the object that was found at that time.

Genske: I don't know who the staff member was who found it to be honest with you.

Daley: It was Erickson wasn't it?

Genske: I have no idea. I can't tell you one way or another.

Audio of hearing at approximately 45:00 mark. Without knowing who the actor was, there is no ability to derive whether the disciplinary action towards Fleming was disparate to that which Erickson was inappropriately attached to through the misquoting of Genske's testimony.

Having found that the third charge against Fleming was not substantiated, the next question is whether it follows from that finding that no discipline at all was warranted. It does not. The Commission finds that discipline was warranted for the other two charges which were substantiated (i.e. Fleming engaged in workplace misconduct when he failed to notify the on-call supervisor about the knife he found and when he did not document the found knife on the shift activity report). That misconduct warranted discipline.

Finally, the Commission finds the level of discipline imposed here (i.e. a one-day suspension) was not an excessive punishment for same. In so finding, it is expressly noted that a one-day suspension is the first step in DOC's progressive discipline sequence.

Signed at the City of Madison, Wisconsin, this 2nd day of April, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman