

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CELESTE BURKS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES, Respondent.

Case ID: 4.0010

Case Type: PA

DECISION NO. 37942

Appearances:

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

Anfin Jaw, 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 Children and Families.

DECISION AND ORDER

On March 1, 2019, Celeste Burks filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Children and Families. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on April 22, 2019, in Waukesha, Wisconsin. The parties made oral argument at the conclusion of the hearing. A transcript of the hearing was received on May 7, 2019.

On May 31, 2019, Examiner Raleigh Jones issued a Proposed Decision and Order affirming Celeste Burks' discharge from the Wisconsin Department of Children and Families. No objections were filed and the matter became ripe for Commission consideration on June 5, 2019.

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

FINDINGS OF FACT

1. Celeste Burks was employed by the State of Wisconsin Department of Children and Families as a licensing/permit program associate in the Division of Early Care and Education, Bureau of Early Care and Regulation, Operations Section, Caregiver Background Unit. She was an eight-year employee with permanent status in class when she was discharged.

2. The Department of Children and Families (DCF) is a State agency.
3. On August 15, 2018, Burks was placed on a Concentrated Performance Planning and Development (CPPD) plan to assist her in bringing her job performance up to a satisfactory level.
4. Despite ongoing feedback and guidance from management, Burks failed to meet the performance standard outlined in her CPPD.
5. DCF discharged Burks for her poor work performance.

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 State of Wisconsin Department of Children and Families had just cause within the meaning of § 230.34(1)(a), Stats., to discharge Celeste Burks.

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

ORDER

The discharge of Celeste Burks by the State of Wisconsin Department of Children and Families is affirmed.

Dated at Madison, Wisconsin, this 20th day of June, 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.

Celeste Burks had permanent status in class at the time of her discharge and her appeal alleges that the discharge was not based on just cause.

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

Burks did background checks on childcare providers, their household members, and employees of the childcare provider. After she compiles certain information, someone else decides whether that person is eligible to work in childcare or run a childcare program.

When employees have work performance problems/issues, DCF first puts the employee on an informal work plan that outlines what the employee's performance issues are and how they need to be improved. If that does not work (meaning the employee continues to have work performance problems/issues), the employee is put on a formal improvement plan. This process is called a Concentrated Performance Planning and Development plan (identified hereafter as CPPD).

In November 2013, Burks was placed on a CPPD. The stated reasons for this action were that she (1) regularly missed deadlines; (2) showed an inability to deal with competing demands; (3) failed to respond to emails promptly; (4) failed to consistently enter application statuses as required; (5) did not meet deadlines on completing those cases; and (6) consistently failed to email the provider timely correspondence as she was required to do. Additionally, Burks was not completing her work, so it had to be reassigned to her coworkers to complete. Her coworkers were able to do similar amounts of work without the work having to be reassigned. In September 2014, Burks' supervisor (Laura Utech) rated Burks' job performance as unsatisfactory, which meant her overall performance did not meet expectations. After that happened, Burks was kept on a CPPD for another six months. During that time period, Burks' job performance improved, and as a result she was taken off the CPPD in March 2015.

In June 2017, Burks was seriously injured in a car accident while driving to work. She was off work recuperating from her injuries for about six months.

While Burks was off work, the workload in the office increased substantially. The reason the work increased is because DCF started doing provider background checks statewide, not just for Milwaukee County (as it had done previously).

On December 18, 2017, Burks returned to work. At her doctor's request, her full-time schedule was temporarily reduced to part-time. Per her doctor's recommendation, Burks initially worked 15 to 18 hours per week for two months. Then in February, 2018, her doctor authorized her to work 22 to 24 hours per week. Then in May, 2018, her doctor authorized her to work 28 hours per week (four days a week).

When Burks came back to work, her coworkers worked with her one-on-one to show her the new work instructions and the new procedural manual that had been created (while she was off work recuperating from the car accident).

Despite this specialized one-on-one training, Burks kept making mistakes with her work and having performance problems. These issues frustrated Burks' coworkers, and they complained to Utech about Burks.

Because Burks was processing cases late and with incomplete information and errors, Utech started meeting one-on-one with Burks several times a week starting in May, 2018. In these meetings, Utech reviewed Burks' caseload with her and offered assistance/suggestions to her to manage her cases, process cases quicker and make fewer errors. Additionally, Utech set a directive that henceforth Burks was to complete a minimum of three cases a week. What precipitated this directive was that while Utech was on vacation for nine consecutive workdays, Burks did not complete any cases at all. When Utech asked Burks what work she had done during that time, Burks was unable to account for her worktime. After Burks received this directive to complete three cases per week, she protested this number was unattainable and she wanted a lower number. The record indicates that when Utech gave Burks this directive there was another part-time employee working in the office. That employee worked 30 hours a week and was completing between five and ten cases a week. At the time, Burks was working 28 hours a week.

Following these meetings, Utech would memorialize in writing what had happened at the meeting. As an example, this is a small portion of what happened at their May 11 meeting:

We also reviewed your caseload and we reviewed the expectations for timeliness in completion of work, volume expectations and accuracy of information gathered. Several of your cases (about 30%) have needed rework due to missing items or incorrect information. We discovered that you regularly reviewed the DOJ and documented findings on the referral form. As this was beyond the scope of your part of the background check, you were instructed to discontinue this analysis as it is part of the next step of the background check. ...

As another example, this is a small portion of what happened at their May 21 meeting:

We also reviewed your current workload and I reinforced the expectation of completing 3 cases per week. I recommended completing other components of the background check while waiting for the FBI results to speed up the completion. The week of 5/7 you completed 1 case and the week of 5/14 you completed 2 cases. It was unclear from looking at the spreadsheet and the S drive the status of your cases. The referral form was missing from several folders and no entries from CCAP, SOR etc. were in the folders. You indicated that you have the process down, but you may be slower than other staff. While I understand you may have needed some more time in January, February and March, I am concerned with your being able to keep up with the work if you are unable to complete even 3 cases per week 5 months after your return to work.

...

As another example, this is a small portion of what happened at their June 14 meeting:

During your status meetings on 5/11 and on 5/21 we discussed expectations for completing work which included timeliness in completion of work, volume expectations and accuracy of information gathered. We discussed working more than 1 or 2 cases at a time and updating the CBC referral form and CBC progress spreadsheet daily as to progress of cases. I set an expectation of completing a minimum of 3 cases per week. ...

On July 25, Utech sent Burks a memo that said Burks' productivity was not satisfactory and needed to improve. This email also said that Burks: (1) was not responding to her (Utech's) email requests for status updates; (2) was not following the work instructions and procedures she had been given; and (3) was not processing her cases in a timely and complete manner and was not completing a minimum of three cases a week. This email also gave Burks a new work directive: henceforth, Burks was to send Utech an email by 9:00 a.m. each day detailing the casework she planned to work on that day, and another email in the afternoon listing the tasks she had completed that day. Burks was also to identify how long it took her to complete each task.

After Burks got the above directive, her emails to Utech with that information were consistently late, and the information provided was not always complete or accurate.

In August 2018, Utech decided Burks' work performance was not improving, and she rated Burks' work performance for the previous six months as unsatisfactory. Utech then asked human resources (HR) for approval to put Burks on a CPPD, and HR approved it. On August 15, 2018, Utech placed Burks on a CPPD. This three-page document identified in detail what areas needed improvement, DCF's expectations, and the consequences should she not be successful. About the latter, the letter provided: "Failure to meet any/all of the expectations described in this CPPD may

result in termination of your employment if you are not able to demonstrate sustained performance.”

After Burks was placed on the CPPD, Utech met with her frequently – just like she had before Burks was placed on the CPPD. In these meetings, Utech would identify Burks’ numerous work deficiencies. When Burks responded to same, she would often say that she wanted “fewer meetings” (with Utech) and “less work.” Following each meeting, Utech memorialized in writing what happened at the meeting. Utech sent Burks a dozen of these lengthy emails.

On September 17, 2018, Utech met with Burks and reviewed the CPPD with her for the previous month. Therein, Utech rated Burks’ work performance as unsatisfactory. The basis for that conclusion were the following facts: Burks was not making progress on starting cases and background checks within one day of assignment; an audit revealed that in 19 of 21 cases assigned in that period, she had not yet started performing background checks; it was taking Burks 16 days, on average, to finish a background check; she was not documenting follow up on cases; her daily work plans and work summaries were often submitted late; she was not responding to emails in a timely fashion; and, in terms of completing three cases per week, she did not meet that expectation in two of the four preceding weeks.

About that same time, Burks’ doctor released Burks to return to work full time as of October 1, 2018, without any restrictions or accommodations needed. After Burks returned to work full time, DCF did not increase her workload immediately. Instead, Utech notified Burks she could stay at completing three cases a week until mid-November when her workload would be increased.

On October 22, 2018, Utech met with Burks and reviewed the CPPD with her for the previous month. Therein, Utech rated Burks’ work performance as unsatisfactory. The basis for that conclusion were the following facts: Burks was not making progress in timely starting background checks; she was inconsistent in her documentation of progress on cases which made it difficult for other employees to follow her work; and in terms of completing three cases per week, she did not meet that expectation in two of the four preceding weeks.

On October 25, 2018, DCF suspended Burks for one day. The suspension letter said this disciplinary action was taken for these reasons:

- Failure to complete the required number of cases per week
- Failure to provide information to your supervisor when requested
- Failure to meet deadlines, respond to emails, and follow work procedures
- Failure to perform adequately phone responsibilities on your assigned days

On November 19, 2018, Utech met with Burks and reviewed the CPPD with her for the previous month. Therein, Utech rated Burks’ work performance as unsatisfactory. The basis for that conclusion were the following facts: while Burks showed improvement in starting cases

sooner than in previous months, she was still not doing so overall in a timely fashion; she was still not following up with cases promptly; she was continuing to make errors in her work and was not completing cases accurately; and she was not following new procedure. At this meeting, Utech told Burks she no longer had to send Utech daily work plans, but still needed to send in daily work summaries. Also at this meeting, Utech told Burks that since her doctor had returned her to work full time without restrictions, her caseload was being increased from three cases per week to eight to ten cases per week. At that time, Burks' full-time coworkers were completing five to ten cases per day.

On December 17, 2018, Utech met with Burks and reviewed the CPPD with her for the previous month. Therein, Utech rated Burks' work performance as unsatisfactory. The basis for that conclusion were the following facts: out of 21 cases for this reporting period, Burks only began three of those in a timely fashion; she offered no explanation why her work was not completed within established timelines or why it was behind; her work was not completed accurately because ten of her twenty-one completed cases had errors; and she was not completing eight to ten cases per week. At that meeting, Utech also gave Burks a letter informing her that DCF intended to terminate her for not bringing her job performance up to a satisfactory level.

After that meeting ended, Burks suffered an on-the-job injury when she was leaving the building injuring her ankle when an exterior door closed on it. She was transported to the hospital for treatment via ambulance.

DCF planned to hold a pre-discipline meeting with Burks the next day – December 18, 2018 – but Burks did not come into work that day because of her injury. As a result, that planned meeting was cancelled. Burks never returned to work because of her injury. She was on medical leave through January 9, 2019.

A pre-discipline meeting was scheduled for January 10, 2019. When Burks did not come in to work that day, DCF held a conference call with Burks to discuss her discharge. However, nothing related to that topic was addressed in that phone call and Burks ended the call. The next day, DCF sent Burks her discharge letter.

* * *

The Commission first addresses the jurisdictional basis for reviewing this matter. Burks was discharged by DCF, so at the beginning of our discussion, we cited § 230.44(1)(c), Stats. (as we do in most discharge cases). That section says, among other things, that a State employee may appeal his or her discharge to the Commission if the appeal alleges the discharge was not based on just cause. That is the statute the Commission traditionally applies to discharges of State employees.

Here, though, Burks asks the Commission to apply § 230.37(2), Stats., to her discharge. The Commission declines to do that. That section covers the medical separation of a State employee. It provides thus:

When an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employee to a position which requires less arduous duties, if necessary demote the employee, place the employee on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employee from the service. ...

This statute requires the State to explore various alternatives before it medically removes an employee from the workplace. This section has traditionally been applied to fitness for duty cases. *See, Kristine Anderson v. Dept. of Safety and Professional Services*, Dec. No. 34656-A (Scott with final authority, 03/2014); *John Walsh v. Dept. of Corrections*, Dec. No. 35041-C (WERC, 03/2017). In order for § 230.37(2) to be applicable to a given case though, the State has to medically separate the employee from his/her employment with the State. That did not happen here (meaning Burks was not medically separated from her employment). Indeed, she was discharged for poor work performance. That is an important distinction. While it is true Burks had some medical issues when she was working part time, that does not mean § 230.37(2) applies to her case. The fact that DCF made no effort to comply with § 230.37(2) in this case is of no legal consequence. Accordingly, Burks' various arguments that DCF failed to comply with all the alternatives listed in that statute are unavailing.

In so finding, it is also noted that Burks' doctor released Burks to return to work full time as of October 1, 2018, without any restrictions or accommodations. That meant that when Burks was discharged in January of 2019, she was not working under any medical work restrictions or accommodations.

The focus now turns to reviewing Burks' discharge using the just cause standard referenced in § 230.34(1)(a), Stats.

For the purpose of context, it is noted that Burks has long had work performance problems. The fact that she was put on a CPPD in 2013 and 2014 proves that. Those work performance problems subsequently reappeared. As a result, in May, 2018, Utech started meeting informally with Burks to address them. In those meetings, Utech counseled Burks on various ways to manage her workload better and make fewer errors. Unfortunately, those informal efforts were unsuccessful and Burks' work performance did not improve.

In August, 2018, two significant matters occurred. First, Burks received an unsatisfactory rating for the prior six months. Second, she was placed on a CPPD. The CPPD cover letter made it crystal clear what areas needed improvement, DCF's expectations in that regard, and the consequences should she not be successful (i.e. discharge).

Collectively, the foregoing put Burks on notice that she was on shaky ground jobwise and her work performance had to improve. Furthermore, she knew a small improvement would not suffice; instead, she had to "demonstrate sustained performance."

That did not happen. For the four months Burks was on the CPPD, she received extensive feedback and guidance from Utech (just as she had in the four months before she was placed on the CPPD). Burks' work performance did not show steady overall improvement. While Burks showed some improvements in some areas from one month to another, over all she did not show sustained improvement. As a result, Utech rated Burks as unsatisfactory for the next four rating periods. Utech's ratings were not merely her subjective opinion; they were supported by objective data and evidence.

The focus now turns to Burks' defenses.

First, Burks contends Utech ignored her pleas for a reduced workload. It would be one thing if the record evidence showed Burks was carrying a large caseload vis-à-vis her coworkers. However, the record evidence does not show that. The caseload Burks found objectionable was completing three cases a week. While Burks was working part time when she was given that directive in May of 2018, the record shows there was another part-time employee who was working about the same number of hours as Burks was. That employee was completing between five to ten cases a week as opposed to Burks' three. After Burks' doctor released her to return to work full time in October, 2018, Utech increased Burks' caseload from completing three cases per week to completing eight to ten cases per week. At that time, Burks' full-time coworkers were completing five to ten cases per day. The inference the Commission draws from these numbers is that Burks' claim she had a high caseload is not supported by the record evidence.

Second, Burks contends that Utech "drowned" her with "frivolous" emails. While it is true that Utech sent Burks numerous lengthy emails, these emails were not frivolous. Every single one of Utech's emails was intended to offer Burks legitimate feedback and guidance. While Burks was free to ignore them, she did so at her own peril.

Third, Burks contends that when she was tasked in July of 2018 with having to send Utech status updates at the beginning and end of each workday, that was a task her coworkers did not have to complete. Yes, it is true that Burks' coworkers did not have to complete daily reports accounting for what they did during the course of the workday. However, there was a perfectly legitimate and non-discriminatory work reason Utech tasked Burks with doing that; namely, Burks had trouble managing her workload and accounting for her worktime. Insofar as the record shows, her coworkers did not have that problem. Under these circumstances, Burks' unique work directive passes muster.

Finally, Burks notes that when she was placed on the CPPD, the cover letter indicated it was for a six-month period. Building on that, Burks contends she was fired prematurely because she did not get six full months under the CPPD; instead, she only got four months. The Commission finds the reference in that letter to six months did not guarantee Burks six more months of employment. After Burks was on the CPPD for four months and had gotten four successive ratings of unsatisfactory, DCF concluded Burks had failed to consistently meet the performance standards outlined in her CPPD. Given the record evidence herein, the Commission is hard pressed to disagree with that conclusion.

Accordingly, the Commission finds there was just cause to discharge Burks for poor work performance.

Dated at Madison, Wisconsin, this 20th day of June, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman