

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEVIN M. KELSAY, Appellant,

vs.

WISCONSIN STATE PUBLIC DEFENDERS OFFICE, Respondent.

Case ID: 501.0006

Case Type: PA

DECISION NO. 37943

Appearances:

Kevin Kelsay, 5435 West Forest Home Avenue #3, Milwaukee, Wisconsin, appearing on his own behalf.

Anfin Jaw, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the Wisconsin State Public Defenders Office.

DECISION AND ORDER

On March 26, 2019, Kevin M. Kelsay filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for three days without just cause by the Wisconsin State Public Defenders Office. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on May 6, 2019, in Milwaukee, Wisconsin. The parties made oral argument at the conclusion of the hearing. A transcript of the hearing was received on May 16, 2019.

On May 31, 2019, Examiner Jones issued a Proposed Decision and Order affirming the suspension. On June 4, 2019, Kelsay filed certain requests/motions and objections. The State did not file a reply, and the matter became ripe for Commission consideration on June 10, 2019.

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

FINDINGS OF FACT

1. Kevin M. Kelsay is employed by the Wisconsin State Public Defenders Office as a legal secretary and had permanent status in class when he was suspended.
2. The Wisconsin State Public Defenders Office (SPD) is a State agency.

3. On October 15, 2018, SPD gave Kelsay a letter of expectation. That letter stated it was “intended to provide direction on the expectations regarding your performance and conduct at work.” That letter also stated it was being issued “due to attorney complaints regarding your performance as well as your unprofessional conduct towards others.” Expectation No. 7 in that letter then went on to say: “Your dialogue and demeanor in the workplace towards attorneys, other employees and outside contacts must be courteous and professional. ...”

4. On November 12, 2018, Kelsay sent two emails to several SPD officials. Those emails violated Expectation No. 7 in the letter of expectation.

5. SPD suspended Kelsay for three days for sending the emails in question.

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 Wisconsin State Public Defenders Office had just cause within the meaning of § 230.34(1)(a), Stats., to suspend Kevin M. Kelsay for three days.

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

ORDER

The three-day suspension of Kevin M. Kelsay by the Wisconsin State Public Defenders Office is affirmed.

Dated at Madison, Wisconsin, this 25th 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.

Kevin M. Kelsay had permanent status in class at the time of his three-day suspension and his appeal alleges that the suspension was not based on just cause.

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

For the last several years, Kelsay's working relationship with his supervisors has been combative and contentious. As just one example, on October 8, 2018, Kelsay sent a three-page letter to the SPD's Affirmative Action Officer and six other department supervisors captioned "Cease and Desist." In that letter, Kelsay demanded that management "cease and desist" from its ongoing "campaign to punish" him for asserting his rights and retaliating against him. Kelsay was subsequently suspended for one day for sending his "cease and desist" letter. He grieved that suspension, and the Commission recently upheld that discipline. *Kelsay v. SPD*, Dec. No. 37929 (WERC, 4/19).

In this case, Kelsay was suspended (again) for writing something to department supervisors. This time, SPD contends that what Kelsay wrote violated Expectation No. 7 contained in the letter of expectation which was given to Kelsay by SPD supervisors on October 15, 2018. Before the Commission addresses what Kelsay wrote and whether it violated that letter of expectation, we are first going to respond to Kelsay's claim that SPD retaliated against him by subjecting him to the letter of expectation in the first place. The Commission rejects that claim because the record contains no persuasive evidence that SPD officials were retaliating against Kelsay's pending Americans with Disabilities Act (ADA) claim when it imposed the letter of expectation on him. Instead, the record supports the assertion, made in the second paragraph of that letter, that "this letter is being issued due to attorney complaints regarding your performance as well as your unprofessional conduct toward others." On its face, that statement provided two facially neutral and non-discriminatory reasons for imposing a letter of expectation on Kelsay.

Having so found, the focus now turns to what the letter of expectation said. In its first paragraph, it said that it was being issued “to provide direction on the expectations regarding your performance and conduct at work.” It then went on to identify seven expectations that Kelsay was to henceforth comply with. While just Expectation No. 7 was cited in SPD’s letter of discipline, the Commission has decided to list all seven of the expectations in this decision because Kelsay’s written response (which will be identified below) characterizes them as “inappropriate and defamatory.” Here are the seven expectations listed in that letter:

1. When an assignment is given to you by an attorney you must complete the assignment in a timely and accurate manner. If you are unable to complete an assignment given to you because of time constraints, you must meet with your supervisor to discuss the priorities of your workload.
2. Accuracy in correspondence with clients is vital. Discovery and other documents sent to clients must be reviewed by you prior to sending to clients.
3. All notices of appointment should be filed in a timely and accurate manner.
4. You are not a licensed attorney. Do not do legal research unless asked specifically to do so. Do not reply to any email correspondence between attorneys or others seeking opinions or information regarding legal decisions, interpretation of statutory language, or policy affecting the adjudication of cases unless you are specifically asked to do so. Please speak directly with your supervisor if you need direction on how to apply this requirement to a specific situation before responding.
5. Do not comment or contribute to email discussion of office or court system policies or practice. If you perceive a misstatement of policy or procedure, please address it with your supervisor.
6. You may not refuse a work request from an attorney without speaking to your supervisor prior to the refusal.
7. Your dialogue and demeanor in the workplace towards your attorneys, other employees and outside contacts must be courteous and professional. Day to day interaction with others is to be successful, productive, helpful and supportive. This includes written communications i.e.: emails, etc.

The Commission finds that none of the aforementioned expectations are inappropriate, defamatory, or discriminatory. Instead, they are all reasonable and appropriate workplace directives. Focusing specifically on Expectation No. 7, the Commission finds that the words “courteous” and “professional” in the first sentence are not vague or ambiguous.

The focus now turns to what Kelsay wrote to his supervisors. On November 12, 2018, Kelsay sent the following email to SPD officials Nancy McLean and Tina Fisher and Department of Administration Attorney Cara Larson:

Enclosed is my grievance in response to this agency's continuing and relenting pattern of harassment and unlawful activity in violation of both state and federal laws, including the Americans with Disabilities Act, which conduct is now well documented and in retaliation for my having asserted my rights to be free from such conduct, and which conduct constitutes an unlawful act of attempting to "handcuff" my zealous representation of my own legal rights.

In this month's SPD Connection, Kelli Thompson wrote:

"We stand with our staff attorney who was simply going about his job serving as a strong advocate for his client. The fact that our attorney was taken into custody, handcuffed, and belly-chained for doing his job is unacceptable. The impact on our attorney and his client is of utmost concern to this agency. The message this action sends to our attorneys whose jobs are to be zealous advocates for the rights of their clients, undercuts a basic tenet of our justice system."

It is the absolute HEIGHT of hypocrisy for the agency headed by Kelli Thompson to attempt to handcuff my zealous self-representation in the pending matters between the agency and I; what's next, actual shackles? (Capitalization in original.)

You all pretend to aspire to great moral heights and self-righteous indignation when a zealous advocate is both handcuffed and shackled, yet that is precisely exactly what you are doing to me.

Have you no shame at all?

Falsely accusing me of misconduct, falsely accusing me of conspiring to cover up non-misconduct, refusing to honor my rights under the Americans with Disabilities Act, reacting to the filing of a US EEOC complaint by retaliating against me and placing an inappropriate and defamatory "Letter of Expectation" in my Personnel File, which prevents me from transferring out of this agency and into an agency where these sorts of managerial behaviors would be unheard of, falsely accusing me of defaming someone directly involved in a matter in which she now claims non-involvement DESPITE VIDEO EVIDENCE CONFIRMING HER INVOLVEMENT. (Capitalization in original.)

Y'all just never quit.

Guess what?

Neither do I.

Every act of intimidation, harassment, retaliation and discrimination only serves to strengthen my resolve, and increase the amount of monetary damages I will be seeking to compensate me for your collective despicable and unlawful conduct.

You think you can shut me up as an advocate by attempting to impose discipline on me for zealously advocating on my own behalf?

Good luck with that.

See you in court.

Kevin M. Kelsay

Legal Secretary

One minute later, Kelsay sent the following email to SPD official Tina Fisher:

Wait, aren't you the person who is supposed to prevent this sort of nonsense from taking place, to act as a liaison between management and employees? And you have yet to even acknowledge my existence, the complaints I have filed, nor lifted a finger to assist.

Not shocking given the complete and utter lack of respect of this agency's management for the law, for the impact of their behavior, and the hypocrisy laden policies of the present administration of this agency in attempting to shackle my zealous self-representation.

Still, to not even have my attempts to communicate with you acknowledged, that's a new low even for the SPD.

Why have a "title" if you have no interest whatsoever in doing the job?

Am I advocating too "zealously" for your tastes? Maybe Borowski's deputy clerk is available to swing by and take me into custody?

Kevin M. Kelsay
Legal Secretary

As noted above, the only expectation which SPD cited in their letter of discipline was Expectation No. 7. Given that narrow focus, the Commission's interpretive task in this case is also narrow. Specifically, all the Commission has to decide in this case is whether Kelsay's two emails sent on November 12, 2018 were "courteous and professional." The Commission has no trouble concluding they were not. While there are many ways to describe Kelsay's two emails, "courteous and professional" are not among them. Kelsay himself described them as "salty."

Accordingly, Kelsay committed workplace misconduct when he sent the two emails referenced above because they violated Expectation No. 7 in the letter of expectation. That, in turn, warranted discipline.

The Commission further finds the level of discipline imposed here (i.e. a three-day suspension) was not an excessive punishment for same. In so finding, it is expressly noted that a three-day suspension is the second step in SPD's progressive discipline sequence, and Kelsay had already received a one-day suspension. Thus, the discipline imposed here passes muster.

In his response to the Proposed Decision and Order, Kelsay states that Examiner Jones was biased and thus requests that he receive a new hearing before a different examiner. The Commission finds no evidence of bias and thus rejects this request. Kelsay also moved that SPD be ordered to fully comply with his discovery request before the requested new hearing is held. The Commission denies this motion but notes that Kelsay has the opportunity to file a petition for rehearing if he now has evidence which could not have been previously discovered by due diligence that is sufficiently strong to reverse or modify the Commissions' order. Lastly, Kelsay asserts the evidence presented does not meet SPD's burden of proof as to misconduct. For the reasons set forth above, the Commission disagrees.

Dated at Madison, Wisconsin, this 25th day of June, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman