

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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KINDELL NOWAK, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0283

Case Type: PA

DECISION NO. 37951

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**Appearances:**

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

Cara Larson, Attorney, Department of Administration, 101 West 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 March 1, 2019, Kindell Nowak filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Corrections. A hearing before Examiner Peter G. Davis was held on May 9, 2019, at the Lincoln Hills School, and the parties made oral argument at the conclusion of the hearing. A transcript of the proceedings was received on June 6, 2019.

On June 14, 2019, Examiner Davis issued a Proposed Decision and Order modifying the discharge to a ten-day suspension. The State filed objections on June 14, 2019, and Nowak replied to those objections on June 17, 2019. The matter became ripe for Commission consideration on June 18, 2019.

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

**FINDINGS OF FACT**

1. At the time of her January 23, 2019 discharge, Kindell Nowak had permanent status in class and was employed as a Youth Counselor by the State of Wisconsin Department of

Corrections (DOC) at the Lincoln Hills/Copper Lake Schools. She had been so employed for 2½ years and had a clean disciplinary record.

2. Nowak did not engage in fraternization with juvenile offenders.
3. Nowak was not negligent when she chose not to report conduct by a juvenile offender as potential self-harm and did not thereby cause a substantial risk to safety and security of her coworkers or juvenile offenders.
4. Nowak's occasional responsive use of vulgar or profane language was not misconduct.
5. Nowak's failure to report a remark by a juvenile offender did not cause a substantial risk to safety and security of her coworkers.
6. Nowak was not obligated to report alleged misconduct by coworkers.
7. Nowak did engage in conduct with juvenile offenders that negatively impacted a coworker's ability to do her job.

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 Kindell Nowak but did have just cause to suspend her for ten days.

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

### **ORDER**

1. The discharge of Kindell Nowak by the State of Wisconsin Department of Corrections is modified to a ten-day suspension.
2. The State of Wisconsin Department of Corrections shall immediately reinstate Kindell Nowak and make her whole in all respects aside from the ten-day suspension.

Signed at the City of Madison, Wisconsin, this 25th day of June, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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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.

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

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

The investigation into Nowak's workplace conduct was triggered by a complaint from a coworker that Nowak was participating in improper conversations with juvenile offenders regarding the coworker's appearance, the appearance of the coworker's baby, and the identity of the baby's father. As part of its investigation into the complaint, DOC reviewed 47 minutes of Nowak's body camera footage (and conducted employee interviews) and determined that Nowak should be discharged. The January 23, 2019, letter notifying Nowak of her discharge summarized DOC's factual determinations as follows:

The investigation determined you contributed to the harassment and bullying of a co-worker with youth at CLS; you were negligent in reporting a self-harm situation; you used vulgar and profane language in your communication with youth and staff; you did not report threats made by the youth toward staff; and you did not report staff are passing notes between the youth from Copper Lake School and Lincoln Hills School.

The January 23 letter summarizes DOC's rationale for discharge as:

Your actions of harassment, fraternization, and gross negligence while creating an unsafe work environment causes a substantial risk to the safety and security of your co-workers and the juvenile offenders under our care.

**A. Consideration of Evidence of Nowak's Asserted Misconduct.**

1. Alleged Harassment and Bullying of a Coworker.

Nowak admits she participated in conversation with female juvenile offenders who were mocking coworker X's appearance. She contends she normally seeks to redirect such conversations even though she believes they are triggered by the coworker's inappropriate treatment of the offenders.

2. Negligence in Reporting a Self-Harm Situation.

Nowak disputes this allegation. She contends her knowledge of the youth led her to correctly believe the youth was not serious about self-harm and further asserts her recent report of a bona-fide self-harm risk had been ignored by supervisors and led to criticism of her judgment. The evidence supports Nowak's judgment.

3. Use of Vulgar and Profane Language.

Nowak admits saying "You're such an asshole" to a youth during youth-initiated banter critical of coworker X. The record reflects Nowak also repeated the words "suck a dick" after those words were uttered by a youth. She generally contends use of vulgar and profane language is common among her coworkers and youth, but she generally refrains from use of such language. The evidence supports a conclusion that use of profane language by juvenile offenders is commonplace, and the Commission concludes that occasional responsive use by a Youth Counselor is not misconduct but rather consistent with the realities of seeking a positive relationship with juvenile offenders.

4. Failure to Report Threats to Staff.

Nowak admits hearing a youth say that if coworker X said something to her, she would "hop on that eye" but contends she did not view the comment as a credible threat. She also asserts such non-credible comments are made on a daily basis by youth. The evidence supports Nowak's judgment.

5. Alleged Inappropriate Relationships with Juvenile Offenders.

Nowak disputes this allegation. She contends she is obligated to and does seek positive interactions with juvenile offenders but also maintains an appropriate, professional distance.

6. Failure to Report Staff Misconduct.

The Warden testified that staff are not obligated to report alleged misconduct by other staff.

**B. Was Misconduct that Served as the Basis for Discharge Established?**

As reflected by the testimony of the Warden and the above-quoted January 23 summary of the rationale for discharge, there were three major bases for ending Nowak's employment: fraternization; failure to report self-harm; and harassment of a coworker.

As confirmed by the applicable position description, Youth Counselors are obligated to have positive interactions with juvenile offenders while not compromising the safety of their fellow employees, the juveniles, and the correctional institution. Consistent with the Commission's reticence to second guess the use of force by correctional employees,<sup>1</sup> it is held that the same degree of deference is appropriate as to a Youth Counselor's judgment as to how best balance the positive interaction/maintain safety obligations. The evidence establishes there inevitably is a range of acceptable styles among Youth Counselors when balancing positive interactions and safety. Some place great emphasis on safety at the expense of positive interactions. Others, like Nowak, emphasize positive interactions. There is a risk that pursuit of positive interactions can bleed into fraternization where an employee's ultimate loyalty lies with the offenders rather than with fellow employees. However, the evidence establishes Nowak did not cross the line into fraternization. Thus, this basis for discharge is rejected.

As to the alleged negligence in failure to report self-harm, the record establishes there are no hard and fast rules to be followed. Rather, as was true for striking a balance between positive interactions and security, there is discretion to be exercised by a Youth Counselor as to when to report self-harm concerns. Indeed, the record reflects that in at least one instance where Nowak did report a self-harm concern, which turned out to be bona-fide, she was criticized for doing so. Because the State did not establish that Nowak's decision not to report the alleged self-harm scenario caused a substantial risk to the safety and security of her coworkers or the juvenile offenders, this basis for discharge is rejected.

As to the third basis for discharge, the evidence establishes that Nowak did participate in inappropriate conversations with juvenile offenders about coworker X which, in turn, negatively impacted the coworker's work environment.

**C. Is There Just Cause for Discharge?**

One of the three bases for discharge is supported by the record. While Nowak's conversation with juvenile offenders about coworker X is serious misconduct, it is concluded that discharge is too harsh of a disciplinary penalty in light of Nowak's clean disciplinary record. Therefore, the discharge has been reduced to a ten-day suspension.

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<sup>1</sup> *Grabowski v. DOC*, Dec. No. 36756 (WERC, 12/16).

The State asserts the Commission lacks authority to impose discipline that departs from the DOC disciplinary progression. However, 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); *Waterman v. DOC*, Dec No. 36741 (WERC, 12/16). 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.

Signed at the City of Madison, Wisconsin, this 25th day of June, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman