

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRISTOPHER GOMES, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0297

Case Type: PA

DECISION NO. 37987

Appearances:

Paul Mertz, P.O. Box 181, Redgranite, Wisconsin, appearing on behalf of Christopher Gomes.

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 Corrections.

DECISION AND ORDER

On May 21, 2019, Christopher Gomes filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for five days without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. Hearings were held on July 2 and 17, 2019, in Milwaukee, Wisconsin. The parties made oral argument at the conclusion of the hearing. Transcripts of the hearings were received by July 26, 2019.

On August 28, 2019, Examiner Jones filed a Proposed Decision and Order affirming the five-day suspension of Christopher Gomes by the State of Wisconsin Department of Corrections. Gomes filed objections on August 28, 2019. The State did not file any objections and the matter became ripe for Commission consideration on September 4, 2019.

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

FINDINGS OF FACT

1. Christopher Gomes is employed by the State of Wisconsin Department of Corrections (DOC) as a probation and parole agent-senior and had permanent status in class when he was suspended.

2. Gomes' job is to supervise offenders who are placed on court-ordered supervision.

3. Gomes disclosed confidential information about an offender Gomes was supervising to an unknown third party via a cell phone text message.

4. DOC suspended Gomes for five days for disclosing that confidential information about the offender.

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 Corrections had just cause within the meaning of § 230.34(1)(a), Stats., to suspend Christopher Gomes for five days.

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

ORDER

The five-day suspension of Christopher Gomes by the State of Wisconsin Department of Corrections is affirmed.

Dated at Madison, Wisconsin, this 11th day of September, 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.

Christopher Gomes had permanent status in class at the time of his five-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 Gomes 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).

Gomes supervises a specialty caseload, typically between the ages of 18 to 25, drug/gun offenders and security threat group offenders.

Gomes supervised offender J.H. An unidentified and anonymous phone number contacted Gomes by text about J.H. a handful of times in 2018 and early 2019. On January 29, 2019, the unidentified phone number contacted Gomes by text about J.H. working with law enforcement. That day, Gomes questioned an FBI taskforce officer and other law enforcement officials about whether J.H. was working as a confidential informant for them. Gomes was told that law enforcement was done working with J.H. because he did not provide them any information. That same day, Gomes responded to the unidentified phone number by text message stating: "He's not working with police anymore." The "he" referenced in Gomes' text message was J.H. After the anonymous person received this information about J.H. from Gomes, she used the information to threaten J.H. Thus, the release of that information by Gomes placed J.H. in danger, caused J.H. to fear retaliation for being identified as a confidential informant, and negatively impacted the trust and working relationship that Gomes had with J.H. An upset J.H. later contacted Gomes and told him that "someone took a screen shot of the text message saying he was working with the police and posted it on social media." The unidentified texter was later identified as J.H.'s ex-girlfriend. Although she threatened to post Gomes' text message about J.H. on social media, she did not do so.

Gomes subsequently told his supervisor what he had done and admitted it was wrong. Thus, Gomes acknowledged his mistake and showed remorse. When Gomes later was asked why he disclosed that confidential information about J.H. to the anonymous person, he said words to the effect of “I just wanted them to leave me alone without actually telling them to leave me alone.” He also said he believed the anonymous person already knew J.H. was cooperating with police, so he did not tell that person something he or she did not already know. The supervision of J.H. was later transferred from Gomes to a different probation and parole agent.

The Commission has no trouble deciding it was misconduct for Gomes to release confidential information about an offender who he supervised to an unknown person. Simply put, that should not have occurred. As already noted, it placed J.H. in danger and caused him to fear retaliation for being identified as a police informant. It was a huge mistake for Gomes to release that information via text message, even if the person who received the text message already knew that information as Gomes believed to be the case. That being so, Gomes can fairly be faulted for his text message. He therefore is responsible and accountable for releasing that confidential information.

Based on the above, the Commission finds DOC had just cause to discipline Gomes for his misconduct.

The focus now turns to the level of discipline imposed here. DOC imposed a five-day suspension on Gomes. In DOC’s progressive disciplinary “schedule,” a five-day suspension is the last level before discharge. The other disciplinary levels in that disciplinary schedule are one-day and three-day suspensions. The normal progressive disciplinary sequence is for an employee with no prior discipline to receive a one-day suspension for the first offense. That did not happen here, and DOC skipped the one-day and three-day parts of the normal progressive disciplinary sequence. Gomes objects to that and contends his discipline should have been less severe than a five-day suspension. He notes in this regard that he had no prior discipline since he began working for DOC in 2002. Thus, in this case, the Commission is tasked with deciding whether a five-day suspension was an excessive punishment for Gomes’ misconduct.

In addressing that matter, Gomes asks the Commission to consider the following facts concerning the discipline imposed on him. After DOC completed its investigation in the matter, a half dozen DOC and Division of Personnel Management (DPM) officials reviewed the matter and opined about what they thought Gomes’ discipline should be. DOC’s Disciplinary Action Routing form shows the first three DOC officials who reviewed the matter thought Gomes should receive a one-day suspension. The next DOC official who reviewed the matter supported a “skip in progression.” Under the instant circumstance where Gomes had no prior discipline on record, the implication of a “skip in progression” is that a one-day suspension would be skipped, so Gomes would get at least a three-day suspension. DPM Director Jim Underhill favored a five-day suspension for Gomes. DOC Secretary Kevin Carr concurred with Underhill’s recommendation of a five-day suspension. In reaching his conclusion, Carr viewed the same set of facts the other DOC officials had reviewed but came to a different conclusion than they did. Carr concluded a five-day suspension was warranted.

Carr is the ultimate decision maker. As the head of DOC, Carr is empowered to review disciplinary cases in the department and decide what level of discipline is imposed. What Gomes essentially wants to do here is pick which DOC official gets to impose his discipline, however, Gomes does not get to decide who the ultimate decision maker is. That call is up to DOC.

Carr testified at the hearing and explained in detail why he went with a five-day suspension over a lesser suspension. Before his rationale is addressed, the following facts are reviewed for context. Carr has 39 years of law enforcement experience, some of which involved working undercover in narcotic investigations. Additionally, he has personally managed hundreds of police informants over the years. Based on Carr's extensive law enforcement experience, it was his view that someone connected to law enforcement should never disclose the identity of an informant, stating once the word gets out on the street that someone is a police informant, law enforcement cannot protect that individual. Based on that premise, Carr concluded Gomes' disclosure of J.H. as a confidential police informant was an egregious act of misconduct and essentially a type of cardinal sin. Carr further felt Gomes' misconduct constituted serious misconduct rather than, say, mere negligence. Carr testified he considered Gomes' misconduct sufficient to warrant discharge, but he decided to not discharge Gomes because of his past overall good work record.

When an employee commits serious misconduct as Gomes did, it logically follows that his discipline can likewise be serious. The record shows DOC has discharged employees who engaged in serious misconduct. Under these circumstances, the Commission concludes that Gomes' serious misconduct warranted a skip in the normal progressive disciplinary sequence.

In so finding, the Commission has considered Gomes' claim that he was subjected to disparate treatment and punished more harshly than other DOC employees were. An employee who raises a disparate treatment claim has the burden of proving that contention.

Gomes relies heavily on the Wilcox case. Wilcox was a prison guard who received a one-day suspension for misconduct in 2018 when he outed some prison inmates as being confidential informants. Wilcox did that by identifying certain inmates as "rats" on an internal prison document known as a range board. A range board contains the name and cell location of each inmate in the housing unit. Wilcox put rat emojis next to the names of inmates suspected of being informants. Wilcox's intended audience for his comments on the range board were other prison guards. He did not intend his comments on the range board to be seen by inmates. Somehow though, inmates learned about Wilcox's comments on the range board. While the Commission considers a one-day suspension for that misconduct to be extremely lenient, the fact that Wilcox received that suspension does not bind DOC to imposing that same suspension on Gomes. The facts in the Wilcox case are sufficiently different from the facts in Gomes' case. The Wilcox case is distinguishable on its facts. Thus, the Commission does not see the Wilcox case as a true comparable to this case for purposes of finding separate treatment. The Commission is satisfied that none of the other disciplinary cases cited and referenced by Gomes in his exhibits are comparable either. As a result, Gomes did not show he was subjected to disparate treatment in terms of the punishment he received.

The Commission has reviewed the objections to the proposed decision raised by Gomes. After thorough consideration, the Commission finds the objections lack merit.

Dated at Madison, Wisconsin, this 11th day of September, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman