

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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TONYEKA NOEL, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0296

Case Type: PA

DECISION NO. 37988

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**Appearances:**

Tonyeka Noel, 2723 Washington Avenue, Racine, Wisconsin, and Kenyatta Dismuke, 2840 - 87th Street, Sturtevant, Wisconsin, appearing on behalf of Tonyeka Noel.

Cara J. 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 May 20, 2019, Tonyeka Noel 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 August 6 and 22, 2019, in Racine, Wisconsin. The parties made oral argument at the conclusion of the hearing, and the hearing transcript was received on August 28, 2019.

On August 29, 2019, Examiner Davis issued a Proposed Decision and Order rejecting the discharge and modifying it to a demotion. The State of Wisconsin Department of Corrections filed objections on August 30, 2019. Noel responded on September 3, 2019, and the matter became ripe for Commission consideration on September 4, 2019.

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

**FINDINGS OF FACT**

1. At the time of her March 29, 2019 discharge by Warden Paul S. Kemper, Tonyeka Noel had permanent status in class and was employed as a correctional sergeant by the

State of Wisconsin Department of Corrections (DOC) at the Racine Correctional Institution (RCI).

2. Noel filed a false police report in July, 2018, in an effort to avoid paying a large utility bill.

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 have just cause, within the meaning of § 230.34(1)(a), Stats., to discharge Tonyeka Noel for the conduct described in Finding of Fact 2.

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

### **ORDER**

The discharge of Tonyeka Noel is affirmed.

Signed at the City of Madison, Wisconsin, this 13th day of September, 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.

Tonyeka Noel 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 Noel 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 Commission has consulted with Examiner Davis regarding the demeanor and truthfulness of the witnesses.

Noel admits to the misconduct she was accused of. Noel made a false police report to the Caledonia Police Department indicating her ex-boyfriend had put her name on a utility bill without her authorization or knowledge. In fact, her ex-boyfriend had no part in establishing the utility account, and the utility company had audio recordings of Noel setting up the account directly. Noel did this in order to attempt to evade paying a utility bill totaling in excess of \$1,500.00 in past due monies. None of this is contested by Noel. Therefore DOC has met its burden of proof establishing the misconduct that took place.

The more complex issue presented in this matter is whether the level of discipline received by Noel is appropriate. DOC discharged Noel for her behavior, and she argues disparate treatment. Noel, who is African-American, argues the Racine Correctional Institution (RCI) has patterns of racial inequality, and if not for her race she would have been afforded discipline short of discharge. Noel specifically argues the one-day suspension of Keith Christensen, a white coworker, supports her claim of disparate treatment.

Noel provided several witnesses who testified as to their experience and observations regarding race relations at RCI. Their collective testimony portrayed an institution that provides better shift assignments, promotional opportunities, leave allowances, and overall treatment to white workers.

While the overall testimony is troubling, it also has several limitations in applicability to the matter before us. Foremost amongst these is Noel's failure to cross-examine Warden Kemper on matters specific to race.<sup>1</sup>

Also troubling for the Commission's application of the testimony provided are several matters relating to the overall relevance in this particular grievance. The nature of racial issues presented had either been far-removed in timeliness, were under current investigation by DOC without any resolution or confirmation at the time of the hearing, involved individuals not directly involved in this disciplinary action, or were purely speculative. As such, even if the dire picture painted of RCI's treatment of minority employees is accurate, there must still exist an element of causality between those racial concerns and the discipline of Noel. Noel did not present sufficient evidence to establish race as a contributing element towards the level of discipline imposed.

In order to establish disparate treatment, it must be demonstrated that the individuals whose discipline is being compared arise from similar circumstances or be "similarly situated." *See Christa Morris v. Department of Corrections*, WERC Dec. No. 35682-A (07/2015). This includes primarily, for our purpose here, similar conduct. Noel's argument is the discipline imposed on Christensen supports her claim of disparate treatment in this matter.

Christensen is a prison guard at RCI. In 2017, while off-duty, Christensen was pulled over during a traffic stop after swerving from his lane. During the stop, Christensen was asked whether he had been smoking marijuana. Christensen answered in the negative. The officer conducting the stop found a marijuana pipe Christensen had hidden within his drink container when he was pulled over. Christensen then admitted to having had inhaled the marijuana and later admitted to his possession of same on his body. Christensen was given a one-day suspension without pay.

Noel argues that both Christensen and she are guilty of the same conduct, namely making false representations to law enforcement while off-duty, yet her actions resulted in discharge while Christensen was only given a one-day suspension. While the light discipline imposed on Christensen is surprising to the Commission, it is important for purposes of determining disparate treatment that the conduct be similar in order to infer the disparate nature of the discipline given.

While Noel is correct in the generalized similarities between the two instances, there are several strong differences between the conduct of Noel and Christensen which ultimately do not meet the threshold for finding that the two were similarly situated. Chief amongst these is that

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<sup>1</sup> The failure of Noel in this regard is due in part to limited availability of the Warden to testify. Kemper testified at the August 6, 2019 hearing, but Noel did not cross-examine Kemper on issues of race at RCI. When the hearing reconvened on August 22, 2019, Kemper was out of the country and unavailable. Given the statutory directive to complete disciplinary grievances within 120 days of filing with the Commission, it proved impossible to have Kemper testify again and be able to refute or affirm the various charges brought to the Commission's attention. While the nature of time limitations should not be used to punish the ability of Noel to present her case, the Commission cannot ignore that Noel did have the opportunity at the initial hearing to question Kemper specific to these allegations and did not do so at that time.

Noel's false police report implicated another innocent individual (her ex-boyfriend) which could have led to financial or criminal consequences to that person. Noel's actions, had she not been caught, created a victim. Noel also instigated the interaction to create the false police report, showing premeditated intent. Christensen's actions, while not in any way laudable, were self-serving and affected no one other than himself. Christensen lied to police defensively after being stopped while driving. These are important distinctions. As such, Noel's claim of disparate treatment is rejected.

Therefore the Commission finds the discipline imposed by DOC was supported by just cause and not excessive. The discharge is affirmed.

Signed at the City of Madison, Wisconsin, this 13th day of September, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman