

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JORDAN KAUFERT, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0295

Case Type: PA

DECISION NO. 37989

Appearances:

Maxwell Charles Livingston, Attorney, Law Offices of Maxwell Charles Livingston, 200 S. Executive Drive, Suite 101, Brookfield, Wisconsin, appearing on behalf of Jordan Kaufert.

Anfin Jaw, Attorney, 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 15, 2019, Jordan Kaufert 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 8, 2019, in Milwaukee, Wisconsin. A stenographic transcript of the proceedings was prepared and received August 13, 2019. The parties filed written argument by August 28, 2019.

On August 30, 2019, Examiner Davis issued a Proposed Decision and Order. The State of Wisconsin Department of Corrections filed objections on September 5, 2019. Kaufert responded to the State's objections on September 5, 2019, and the matter became ripe for Commission consideration on September 6, 2019.

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

FINDINGS OF FACT

1. At the time of her March 26, 2019 discharge, Jordan Kaufert had permanent status in class and was employed as a correctional officer by the State of Wisconsin Department of Corrections.

2. Kaufert did not engage in misconduct by the act of writing two letters to a friend in the Sheboygan County jail.

3. Kaufert did engage in misconduct through the content of the September 6, 2018 letter.

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 Jordan Kaufert.

3. The State of Wisconsin Department of Corrections did have just cause, within the meaning of § 230.34(1)(a), Stats., to suspend Jordan Kaufert for three days.

4. Jordan Kaufert is a prevailing party within the meaning of § 227.485, Stats., but the position of the State of Wisconsin Department of Corrections as to her discharge was substantially justified within the meaning of § 227.485(2)(f), Stats.¹

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 Jordan Kaufert is rejected and modified to a three-day suspension.

2. The State of Wisconsin Department of Corrections shall immediately reinstate Jordan Kaufert and make her whole with interest.

3. Jordan Kaufert's motion for fees and costs is denied.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ The State met its burden to show (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.

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.

Jordan Kaufert 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 Kaufert 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).

Reviewing the record as a whole, the Commission is persuaded by the credible testimony of Kaufert and Lamb (and the content of Kaufert's August 30, 2018 letter) that Kaufert did not know her jailed friend was on probation, that she contacted supervisor Hall before she wrote to her friend, and that she reasonably understood Hall to advise her she could contact her friend and then turn in the appropriate paperwork later once all details were known. Based on these findings, the primary basis for the discharge has been rejected.²

However, Kaufert did engage in misconduct through the content of the September 6, 2018 letter wherein she coached her friend on how to evade regulations as to photo volume and, more significantly, disclosed the location of a jailed former DOC employee thereby potentially jeopardizing that inmate's safety from other inmates. Kaufert contends she engaged in no misconduct because the inmate's location was public knowledge. However, her inclusion of this information in the letter is indicative of the reality that those housed in the jail may not have been privy to what was otherwise public. The Commission is persuaded this level of misconduct

² Kaufert argues that because the discharge is premised on conduct other than that listed in § 230.34(1)(a), Stats., it must be rejected even if the factual allegations were proven. Review of § 230.04(13m), Stats., and the administrator's standards thereafter established in Section 410.030 of the Wisconsin Human Resources Handbook persuade the Commission otherwise.

In its post-hearing brief, the State argues for the first time that an additional basis for the discharge is a visit by the friend to Kaufert's home. Kaufert correctly argues that because there is no reference to this visit in the discharge letter Kaufert received, it cannot now be considered. Further, any such visit would not have violated the instructions Kaufert reasonably understood she had received regarding filing the appropriate paperwork once all details were known.

provides just cause for a three-day suspension.³ Kaufert is to be reinstated without loss of seniority and made whole as to wages and benefits with interest.⁴

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

³ 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.

⁴ See generally Wis. Admin. Code § ERC 94.07; *Gerriston v. DOC*, Dec. No. 31234-B (WERC, 7/06); and *Brown County*, Dec. No. 20857-D (WERC, 5/93).