

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD GUERRERO, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0347

Case Type: PA

DECISION NO. 38436

Appearances:

Alf Langan, Attorney, 2643 Libal Street, Suite #2, Green Bay, Wisconsin, appearing on behalf of Richard Guerrero.

Cara Larson, Attorney, 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 March 11, 2020, Richard Guerrero filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A telephone hearing was held on May 5, 2020. The parties made oral argument at the conclusion of the hearing.

On June 3, 2020, Examiner Jones issued a Proposed Decision and Order affirming the discharge. No objections were filed, and the matter became ripe for Commission consideration on June 9, 2020.

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

FINDINGS OF FACT

1. Richard Guerrero (Guerrero) was employed by the State of Wisconsin Department of Corrections as a correctional officer at the Green Bay Correctional Institution (GBCI) and had permanent status in class when he was discharged.

2. The Department of Corrections (DOC) is a state agency responsible for the operation of various correctional facilities, including GBCI in Green Bay, Wisconsin.
3. On October 7, 2019, Guerrero initiated an altercation with two children while off-duty at his home.
4. Guerrero was later charged with two counts of felony child abuse for his October 7, 2019 conduct.
5. Guerrero did not timely advise GBCI in writing of his contact with law enforcement regarding the October 7, 2019 incident.
6. Guerrero's conduct referenced in Finding of Fact 3 impaired and adversely affected his ability to perform his duties as a correctional officer.
7. DOC discharged Guerrero for the conduct referenced in Finding of Fact 3 and 5.

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 Wis. Stat. § 230.44 (1)(c).
2. The State of Wisconsin Department of Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Richard Guerrero.

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

ORDER

The discharge of Richard Guerrero by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 23rd day of June, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley

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.

Richard Guerrero had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

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

Guerrero admits to the following. On October 7, 2019, while off-duty, he was at his home when his fiancé and her sons – ages 9 and 5 - returned to their house. His fiancé told Guerrero that while they were at Walmart, the boys had misbehaved and not listened to her. Upon hearing this, Guerrero became mad and upset with the boys and told them to go into the living room and stand against the wall. The boys did as directed. Guerrero then yelled and screamed at them for their behavior at Walmart and admonished them for not listening to their mother. When the boys were non-responsive to his verbal admonitions, this made Guerrero angrier and he did the following. He first hit the oldest boy with his open hand on the side of his head. Guerrero then hit the younger boy in the same fashion (i.e. with an open hand on the side of his head). Guerrero then went to hit the older boy again, but the boy put up his hands and blocked the hit. Guerrero then pushed the boy backwards into the wall. After the boy hit the wall he fell to the floor and his glasses flew off his face. In falling to the floor, his neck hit a chair. Guerrero then picked up the younger boy underneath his armpits and carried him over to the bottom of a staircase. Then he dropped the boy on the bottom stair from an unspecified distance and told him to go to his room. Guerrero then went back to the older boy who was still on the floor and told him to get up and go away, which he did.

On November 22, 2019, Guerrero was charged with two felony counts of child abuse for what he did on October 7, 2019. These charges were brought against Guerrero by the Brown County District Attorney's Office. Guerrero had his initial appearance on December 12, 2019, a preliminary hearing on January 7, 2020 and was arraigned on January 21, 2020. Those criminal

charges were still pending and had not yet been adjudicated when the hearing was held in this matter.

DOC has two work rules that prohibit certain types of off-duty conduct. The first work rule is #25. It provides:

Engaging in any outside activities (including violations or convictions of criminal or other laws) which may impair the employee's independence of judgment or impair the employee's ability to perform his/her duties as an employee of the state.

The other work rule is #4 and defines "serious misconduct." It provides:

Serious Misconduct: Off-duty illegal behavior where a substantial relationship exists which adversely affects the employee's ability to perform the duties of the position and through due process, preponderance of the evidence supports discipline prior to an actual conviction.

The discharge letter received by Guerrero describes in pertinent part DOC's view as to the relationship between his off-duty conduct and his duties as a correctional officer:

The Department and its employees have a legal responsibility to the public to ensure that correctional, rehabilitation and treatment programs are carried out in a legal, effective, safe and humane manner. As such, employees, especially correctional officers are held to a higher standard of expectations regarding their conduct both on and off duty. Executive Directive 42 is clear in stating an employee who is charged with or convicted of an offense occurring on or off duty may be subject to discipline for the conduct which gave rise to the charge or conviction if it meets the just cause threshold. As a Correctional Officer with the DOC, you are expected to adhere to the laws of the State of Wisconsin and to set an example for the inmates you supervise. In addition, your job functions require you to provide effective counsel to inmates seeking assistance with their rehabilitative needs, which could include domestic or child abuse. In your statements to DOC investigators, you admit to striking the children in the head and pushing one of the children into the wall which caused him to fall to the ground. As a Correctional Officer, you are called to be a positive rehabilitative influence through your conduct. However, your behavior on October 7, 2019 is not demonstrative of your ability to serve as such influence or example to the inmates and the community you serve. You also described your job responsibilities as a Correctional Officer to protect the men in our custody from

assault or any type of harm. Your actions on October 7, 2019, does not demonstrate a confidence that you can protect the men in our custody and your actions are also in direct violation of Executive Directive 42. Therefore, you have left me with no other option but to terminate your employment.

The Commission concurs with that reasoning. Guerrero's off-duty conduct impaired and adversely affected his ability to perform his duties.

Guerrero also committed misconduct following the October 7, 2019 incident when he failed to timely notify DOC in writing about his police contact on October 9, 2019. His written notification to DOC regarding same occurred January 9, 2020. Per department policy, his written notice should have been provided sooner. His failure to do so is also cited in the discharge letter.

Given the foregoing, the Commission concludes that Guerrero engaged in misconduct. The issue then becomes whether the misconduct was sufficiently serious to warrant the discharge of an employee.

Guerrero attacks the level of discipline asserting he was subjected to disparate treatment and punished more harshly than other DOC employees. In this regard, he relies exclusively on a single situation that arose at GBCI involving another correctional officer named Zitek. The record does not identify what Zitek did, but it can be inferred that he engaged in off-duty misconduct. At the hearing, the GBCI warden opined that in his view, Guerrero's off-duty misconduct was more serious than Zitek's. Records from the Wisconsin Circuit Court Access Program (CCAP) website indicate that Zitek was charged with misdemeanor disorderly conduct and he pled no contest to same. As part of that process, Zitek entered into a deferred prosecution agreement. As of the date of the hearing herein, Zitek was still on the payroll at GBCI, and had not been terminated, but it was unclear what his employment status was. The question before the Commission is whether the Zitek matter is a true comparable to Guerrero's situation. The Commission finds it is not for these reasons. First, we do not know the facts in Zitek's case whereas we do know what Guerrero did. Thus, we are unable to decide if they are factually comparable. Second, the criminal charges against the two men are different. Zitek was charged with disorderly conduct while Guerrero was charged with child abuse. Third, we have the warden's testimony that in his view, Guerrero's misconduct was more serious than Zitek's. The CCAP records buttress the warden's view because Zitek was charged with a misdemeanor while Guerrero was charged with a felony. The foregoing factual differences establish that the Zitek matter cannot be considered a true comparable to Guerrero's situation. We therefore find that Guerrero did not show he was subjected to disparate treatment in terms of the discipline he received.

Guerrero's misconduct does not fall within the confines of the Wis. Stat. § 230.34(1)(a) list of conduct that specifically allows for discharge without regard to progressive discipline. However, Wis. Stat. § 230.04(13m) and the provisions of sec. 410.030 of the Wisconsin Human Resources Handbook authorized by Wis. Stat. § 230.04(13m) allow discharge to be a disciplinary response for serious misconduct such as that present here where the employee has

not previously progressed thru all portions of a disciplinary progression. The Commission finds Guerrero's misconduct to be sufficiently serious to provide just cause for discharge.

The Commission therefore affirms the discharge of Guerrero.

Issued at Madison, Wisconsin, this 23rd day of June, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley