

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

JEFF SOMMERFELDT, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0388

Case Type: PA

DECISION NO. 38753

---

**Appearances:**

Jeff Sommerfeldt, 5523 200<sup>th</sup> Avenue, Bristol, Wisconsin, appearing on his own behalf.

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 September 2, 2020, Jeff Sommerfeldt filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for three days without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A phone hearing was held on October 22, 2020. The parties made oral arguments at the hearing's conclusion. A Proposed Decision and Order was issued by Examiner Jones on November 10, 2020 rejecting the suspension and ordering the State of Wisconsin Department of Corrections to make Sommerfeldt whole. No objections were filed by the parties and the matter became ripe for Commission consideration on November 16, 2020.

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

**FINDINGS OF FACT**

1. Jeff Sommerfeldt is employed as the buildings and grounds superintendent at the Racine Youthful Offender Correctional Facility (RYOCF) and had permanent status in class at the time of his suspension.

2. The Department of Corrections is a state agency responsible for the operation of various correctional facilities, including RYOCF in Racine, Wisconsin.

3. On June 22, 2020, DOC suspended Sommerfeldt for three days for various acts of alleged misconduct.

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 Wis. Stat. § 230.44(1)(c).

2. The State of Wisconsin Department of Corrections did not meet its burden of proof as to Sommerfeldt's alleged misconduct.

3. The State of Wisconsin Department of Corrections did not have just cause, within the meaning of Wis. Stat. § 230.34(1)(a), to suspend Jeff Sommerfeldt for three days.

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

### **ORDER**

The three-day suspension of Jeff Sommerfeldt is rejected. The State of Wisconsin Department of Corrections shall make Sommerfeldt whole.

Issued at the City of Madison, Wisconsin, this 25<sup>th</sup> day of November, 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.

Jeff Sommerfeldt had permanent status in class at the time of his suspension and his appeal alleges that the suspension was not based on just cause.

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

Sommerfeldt's suspension notice stated he was suspended for the following misconduct:

This action is being taken due to the fact that on various dates from approximately 2017 - 2019, you made multiple comments to staff members that were inappropriate, offensive and in violation of the Department's Executive Directive 5 Employee Harassment and Discrimination. Specifically, during a unit meeting on 11/25/19 with the Buildings and Grounds Crew you made multiple comments which were interpreted as profane, unwelcome commentary/jokes of a sexual nature. This included commentary from you to a subordinate regarding a green novelty pen saying it was making you insecure, jealous and inferior due to the pen being so big. During that same meeting you also stated, in reference to the salt truck not working, that it had "ED" and this was interpreted by others as erectile dysfunction.

Another example included a luncheon you organized for the Buildings and Grounds crew on 12/19/19. On this date, you excluded Josh Kratochvil and Travis Houston by failing to communicate specifically to the whole unit of the date and time of this activity. You waited until after 12:00 O'clock noon when you knew Mr. Kratochvil and Mr. Houston would have their radios off to communicate this event.

Additionally, you made comments on two separate occasions towards Josh Kratochvil and Travis Houston in front of a unit meeting with other individuals present about their see-through shirts and anatomy. You made degrading comments such as look at you with your 'titties' hanging out. You pointed out that you could see their nipples through the T-shirt and it was inappropriate. You did not address

these matters individually and respecting confidentiality of the employee. Your actions caused Mr. Kratochvil to feel self-conscious, embarrassed and degraded. You caused Mr. Houston to feel awkward and inappropriate.

The question in this case is whether DOC proved the claims made in the disciplinary notice. Based on the following rationale, the Commission finds they did not.

We begin with this factual context. Sommerfeldt is the longtime head of the buildings and grounds department at RYOCF. When this matter arose, Sommerfeldt supervised seven employees in the department.

There is ongoing conflict between Sommerfeldt and two of the employees in the department: Josh Kratochvil and Travis Houston. Kratochvil and Houston are friends and are viewed by the other employees as a team. With regard to that conflict, Sommerfeldt points the proverbial finger of blame for it on Kratochvil and Houston, while they, in turn, blame him. Regardless of who is responsible, the tension between them is palpable. Sommerfeldt contends that the two employees have it out for him. Sommerfeldt believes they report his activities to management outside the department and the normal chain of command. It appears that they do. Their on-going conflicts have fractured the department into warring camps. Obviously, Kratochvil and Houston are in the camp opposed to Sommerfeldt. Aykas Manucharyan and LaShawnda Hampton are in the camp which backs Sommerfeldt. The employees in these two camps dislike the employees in the other camp. As just one example, Hampton was recently disciplined for calling Kratochvil an “asshole”. The remaining three employees in the department (Carl Genz, Norman Trudrung and Don Burrows) try to avoid being drawn into this on-going workplace drama and are not a part of either camp.

In the summer of 2019, Sommerfeldt and Kratochvil had an employee mediation session. That mediation was not successful in resolving the on-going dispute.

In early 2020, Kratochvil filed a formal complaint against Sommerfeldt that accused Sommerfeldt of making inappropriate sexual comments in front of the staff. The alleged comments will be addressed in detail below. After this complaint was filed, DOC conducted an investigation and interviewed employees. Not everyone in the building and grounds department was interviewed. Instead, the only employees interviewed were Sommerfeldt, Kratochvil, Houston, and Manucharyan. At the hearing, when DOC’s investigator was asked why just those four employees were interviewed, she responded that it was because those four employees presented “a balanced picture”. When the four previously identified employees were interviewed as part of the Employer’s investigation, there were conflicting views about what Sommerfeldt had said and done. Kratochvil and Houston alleged that Sommerfeldt had made the inappropriate statements at issue. Sommerfeldt and Manucharyan disputed that contention. Following the investigation, DOC management decided to credit the claims of Kratochvil and Houston over Sommerfeldt’s and Manucharyan’s denial.

Before we make our own finding, we have decided to note that in our experience, what DOC did here is unique for this reason: what oftentimes happens when there are conflicting claims

between supervisors and employees about a disputed matter is that management typically credits, and backs, the supervisor. Obviously, that did not happen here.

We will now address all of the incidents referenced in the suspension letter in the order listed. Collectively, these incidents can be characterized as involving three separate acts in this ongoing workplace drama.

The first two incidents allegedly occurred at a staff meeting on November 25, 2019. This was a typical staff meeting attended by all staff.

The first incident involves what came to be known as the pen matter. For background purposes, it is noted that Manucharyan had recently cleaned out a former employee's empty office and, in doing so, found a large novelty pen that previously belonged to the former employee. The pen was described by all the witnesses as a novelty pen that was over a foot long. Some witnesses described it as the type of pen given away as a prize at carnivals and popular with elementary age students. Manucharyan brought the pen to the staff meeting and used it to take notes. It is undisputed that Sommerfeldt saw the pen that Manucharyan had brought to the meeting and then commented that Manucharyan had found the pen that previously belonged to the former department employee (who he named). What is disputed is whether Sommerfeldt said anything else about the pen. According to both Kratochvil and Houston, Sommerfeldt said something to the effect that the pen made him feel uncomfortable and inadequate because the pen was so big. Kratochvil and Houston both testified that they took this statement to be a sexual reference. Sommerfeldt emphatically denied making the statement attributed to him. Nothing else was said during the meeting about the pen.

As already noted, Kratochvil and Houston contend that Sommerfeldt said it. After they testified though, six more witnesses testified. All were at the meeting in question and thus were first hand witnesses. They were Sommerfeldt and the other five members of the department (Hampton, Manucharyan, Genz, Trudrung and Burrows). Not one of them buttressed Kratochvil's and Houston's account that Sommerfeldt said anything sexual about the pen. Instead, they all testified that Sommerfeldt either did not say it, or they do not recall or remember Sommerfeldt making any such statement. While we will weigh the credibility of these conflicting claims later in our discussion, what initially catches our attention is that the vast majority of those factual witnesses who testified (namely, six out of eight) did not back Kratochvil's and Houston's assertion. One would think that some of them would have, because the alleged statement is somewhat unique, and the more unique a statement is the more likely it is to be remembered. The fact that none of those present at the meeting support Kratochvil's and Houston's assertion is problematic to DOC's case.

We now turn to the "ED" comment. During that same staff meeting, another topic that was discussed was that a new salting mechanism on a truck was not working properly. All the witnesses agree that the salter was discussed in that meeting. What is disputed is whether Sommerfeldt said that the salter "had ED".

The focus now turns to whether Sommerfeldt referenced “ED” in a staff meeting. As already noted, Kratochvil and Houston contend that Sommerfeldt said it. After they testified though, six more witnesses testified. As previously noted, all were at the meeting in question and thus were first hand witnesses. Once again, they were Sommerfeldt and the other five members of the department (Hampton, Manucharyan, Genz, Trudrung and Burrows). Not one of them buttressed Kratochvil’s and Houston’s account that Sommerfeldt said it. Instead, they all testified that Sommerfeldt either did not say it, or they do not recall or remember Sommerfeldt making any such statement. While we will weigh the credibility of these conflicting claims next, again what catches our attention is that the vast majority of those factual witnesses who testified (namely, six out of eight) did not back Kratochvil’s and Houston’s assertion. One would think that some of them would have, because the alleged statement is again unique, and the more unique a statement is the more likely it is to be remembered. The fact that none of those present at the meeting support Kratochvil’s and Houston’s assertion is problematic to DOC’s case.

In deciding who to credit, the Commission is well aware that Sommerfeldt, Kratochvil and Houston dislike each other. Additionally, Manucharyan and Hampton dislike Kratochvil and Houston and vice versa. Given this known animosity, each of them has a basis for potential bias which could color their testimony in this matter. Additionally, Sommerfeldt, Kratochvil and Houston have a lot on the line, so to speak. That gives each of them a reason to fabricate their account of what happened.

This case ultimately boils down to whether to credit Kratochvil’s and Houston’s testimony that Sommerfeldt made the statements at issue, or Sommerfeldt’s denial that he did. In making that call, it would have been helpful to the Commission if there was an explanation in the record why DOC management decided to credit Kratochvil and Houston over Sommerfeldt. However, there is no such explanation in the record. That being so, all the Commission has to go on in deciding this case was the record testimony. Over the course of the five-hour hearing, eleven witnesses testified. After weighing all their testimony, especially the fact witnesses, we reach a different decision than DOC management did. Specifically, we credit Sommerfeldt’s testimony for the following reasons. First, it would be one thing if the record evidence showed that Sommerfeldt has a propensity for being untruthful. However, the record evidence does not show that. In fact, the record evidence is to the contrary because a former supervisor at RYOCF testified without contradiction that Sommerfeldt is a man of integrity and truthfulness. In contrast, there is nothing in the record evidence about the character, integrity and truthfulness of Kratochvil and Houston. Second, it would also be one thing if the record evidence showed that Sommerfeldt has a history of saying offensive or inappropriate things in workplace discussions or at staff meetings. However, the record does not show that either. Finally, it would be one thing if the record showed that Sommerfeldt has a history of making sexual references or engaging in sexual banter in workplace discussions or at staff meetings. However, the record does not show that either. Given all the foregoing, we accept Sommerfeldt’s assertions that he did not make the pen and “ED” statements attributed to him by Kratochvil and Houston. Building on that premise, we find that DOC simply did not prove the first set of assertions contained in the suspension letter.

The focus now turns to the second assertion made in the suspension letter. It references a staff luncheon that Sommerfeldt organized and held on December 19, 2019. Kratochvil and

Houston did not attend the luncheon. The suspension letter contends that Kratochvil and Houston would have attended the luncheon if only they had known about it, but Sommerfeldt intentionally excluded them from attending by waiting until their work radios were off to announce the luncheon.

As was noted earlier, supervisors are not supposed to intentionally exclude employees from group work activities. If they do, they can fairly be faulted for doing that.

However, the record facts show otherwise. For background purposes, it is noted that Sommerfeldt regularly sponsors luncheons for building and grounds staff for team building purposes. All staff are invited and encouraged to attend, and reminders of upcoming luncheons are regularly given at staff meetings. As it relates to this particular luncheon, the record shows that staff was reminded about the December 19 staff luncheon at staff meetings on December 16 and 18, 2019. Given that advance notice of the luncheon was given, the claim in the suspension letter that Sommerfeldt intentionally “excluded Josh Kratochvil and Travis Houston by failing to communicate specifically to the whole unit of the date and time of this activity” lacks support in the record. We further find that Kratochvil and Houston knew about the luncheon, but simply chose not to attend. Lest there be any question about it, Houston testified that on the day in question, he could smell the ham being cooked in the crock pot in the office that morning. That admission is significant because on a normal workday without a luncheon, there would not be ham cooking in a crock pot in the office.

Before we review the next part of this claim, we have decided to note that it is common knowledge in the building and grounds department that Kratochvil and Houston take their lunch break (which starts at noon) by going out to their cars in the parking lot and turning off their work radios. That is what Kratochvil and Houston did on the day in question. The suspension letter contends that Sommerfeldt intentionally “waited until after 12:00 O’clock noon when you knew Mr. Kratochvil and Mr. Houston would have their radios off to communicate this event.” This claim also lacks support in the record. While Sommerfeldt did indeed make an announcement on the radio that lunch was served, he did not make that announcement “after 12:00 O’clock noon” (as the suspension letter averred). Instead, he made that announcement over the radio at 11:35 am, and those who attended the luncheon were eating by 11:45 am. Those facts persuade us that when Kratochvil and Houston left the building to go out to their cars at noon, they had heard Sommerfeldt’s announcement over the radio that the luncheon was starting. While Kratochvil and Houston certainly had the right to not attend the luncheon, they were not intentionally excluded from attending it (as the suspension letter averred). Thus, this claim likewise was not proven.

The focus now turns to the third assertion made in the suspension letter that Sommerfeldt made comments on two separate occasions at staff meetings to Kratochvil and Houston “about their see-through shirts and anatomy”. Exactly what Sommerfeldt said to them is disputed.

Before we address what Sommerfeldt supposedly said though, we are first going to address when it supposedly happened. The suspension letter did not identify when this supposedly happened. In our view, that is not surprising, because Kratochvil and Houston testified they thought it happened two or three years ago (meaning in 2017 or 2018).

For the sake of discussion, it is initially assumed that Sommerfeldt made offensive and inappropriate statements to Kratochvil and Houston at staff meetings in 2017 or 2018 about their workplace attire. If Sommerfeldt did do that, he should not have done so. However, the time for DOC to address that alleged misconduct was back then, not years later. The charges are now stale. Given their age, the charges give the appearance that they were included to add weight to the other charges against Sommerfeldt and show a pattern of alleged inappropriate statements.

Having opined about the timing of these two claims, we now address the merits of the charge involving Houston. For the purpose of background, it is noted that at the time, Houston had a well know history of wearing tight, see-through shirts to work. Those types of shirts are not appropriate for the workplace (even in a buildings and grounds department). Because of that, Sommerfeldt was certainly within his rights as a supervisor to tell Houston to not wear tight, see-through shirts to work.

The next question is whether Sommerfeldt made an offensive or inappropriate statement to Houston when he gave him this directive (to not wear tight, see-through shirts to work). Houston testified that Sommerfeldt said his (Houston's) "titties were hanging out". For his part though, Sommerfeldt expressly denied using the term "titties". According to Sommerfeldt, he simply told Houston he could see his chest (through his see-through shirt). Kratochvil was the only employee who buttressed Houston's account of the incident. The other departmental employees testified that Sommerfeldt either did not say it, or they do not recall or remember Sommerfeldt making any such statement. For the same reasons we noted previously, the Commission credits Sommerfeldt's account of the incident and concludes Sommerfeldt did not make the offensive statement to Houston that is alleged in the suspension letter. In the alternative, even if Sommerfeldt did make that offensive statement to Houston two or three years ago, it simply does not warrant discipline now because it is stale.

The final question is whether Sommerfeldt once told Kratochvil that he could see his (Kratochvil's) "nipples" through his shirt. Kratochvil testified that Sommerfeldt said that, while Sommerfeldt denied it. Houston was the only employee who buttressed Kratochvil's account of the incident. The other departmental employees testified that Sommerfeldt either did not say it, or they do not recall or remember Sommerfeldt making any such statement. For the same reasons we noted previously, the Commission credits Sommerfeldt's account of the incident and concludes Sommerfeldt did not make the offensive statement to Kratochvil that is alleged in the suspension letter. In the alternative, even if Sommerfeldt did make that offensive statement to Kratochvil two or three years ago, it simply does not warrant discipline now because it is stale.

Since none of the claims in Sommerfeldt's suspension letter have been substantiated, DOC failed to prove that Sommerfeldt committed the misconduct he was charged with.

Inasmuch as DOC did not prove the first element of just cause, it is unnecessary to address the second element of just cause (i.e. whether DOC established that a three-day suspension was appropriate under the circumstances). Therefore, there was not just cause to suspend Sommerfeldt for three days. His suspension is rejected and he is to be made whole.



Issued at the City of Madison, Wisconsin, this 25<sup>th</sup> day of November, 2020.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

---

James J. Daley