

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JASON THOMPSON, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0424

Case Type: PA

DECISION NO. 38925

Appearances:

Karla Souzek, N1293 S. White River Road, Wautoma, Wisconsin, appearing on behalf of Jason Thompson.

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 December 28, 2020, Jason Thompson 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. A telephone hearing was held on March 22, 2021. The parties filed post hearing briefs on March 26, 2021.

On April 7, 2021, Examiner Jones issued a Proposed Decision and Order concluding DOC did not have just cause to suspend Thompson for five-days; modifying the five-day suspension to a one-day suspension and requiring Thompson be made whole for the difference. No objections to the Proposed Decision and Order were filed by either party on or before the deadline of April 12, 2021.

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

FINDINGS OF FACT

1. Jason Thompson is employed by the State of Wisconsin Department of Corrections (DOC) as the building and grounds superintendent at the Columbia Correctional Institution (CCI) and had permanent status in class at the time of his five-day suspension.

2. CCI is a maximum security correctional facility in Portage, WI operated by DOC, a state agency of the State of Wisconsin.

3. Thompson's job performance was deficient in certain areas.

4. DOC suspended him for five days for negligence and job performance deficiencies.

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 appeal pursuant to Wis. Stat. § 230.44(1)(c).

2. The State of Wisconsin Department of Corrections did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Jason Thompson for five days but did have just cause to suspend him for one day.

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 Jason Thompson by the State of Wisconsin Department of Corrections is modified to a one-day suspension, and he shall be made whole for the difference.

Issued at Madison, Wisconsin, this 26th day of April, 2021.

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.

Jason Thompson 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 Thompson 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).

Early on April 16, 2020, two inmates escaped from CCI. While the two inmates were captured the next day, their escape caused a substantial risk to the community.

Afterwards, DOC conducted numerous investigations into the causes of the escape. As a result of those investigations, DOC meted out disciplinary action to those employees it thought had been remiss, to some extent, in the performance of their duties. Building on that premise, DOC concluded that their poor work performance had contributed, in part, to the inmates' escape and, as a result, they were culpable for it. Specifically, DOC discharged seven employees and gave two employees five-day suspensions. Additionally, four employees who were under investigation resigned or retired before discipline was imposed on them.

With one exception that will be noted later, all the employees who were disciplined – or faced discipline – worked either in security or in food service, where one of the inmates who escaped had worked. Specifically, nine employees worked in security and three in food service. All these employees received their discipline between May and July of 2020.

After this disciplinary action was imposed, four employees who were discharged and/or suspended grieved their discipline. Three of those grievances were ultimately settled with the discipline being reduced. Specifically, two of the discharges were converted to demotions, and one of the five-day suspensions was reduced to a three-day suspension. The employee whose discharge grievance did not settle appealed his discharge to the Commission, which subsequently upheld it.

After all the employees referenced above had been disciplined, DOC decided that one more employee warranted discipline. That employee, Jason Thompson, is the one involved here. He is the buildings and grounds superintendent at CCI. He supervises the maintenance staff and among other things is responsible for maintaining the stun fence. (Note: It will be described in more detail later). Thompson received a five-day suspension for negligence and job deficiencies.

In reviewing his suspension, the Commission has decided to note at the outset that we understand why the security and food service workers referenced above were disciplined for their part in the inmates' escape. As already noted, DOC concluded that those employees were remiss in some aspect of their job performance, and that had contributed to the inmates' escape. Take, for example, the discharge which we reviewed. In that case, the record established that the officer was patrolling the outer security fence in a patrol vehicle when he literally drove past the two inmates as they were in the process of escaping the prison. The employee failed to see them as they escaped. In our view, we can see a clear line from that employee's poor work performance to his culpability for the inmates' escape. Next, we are going to comment on the case where a sergeant's five-day suspension was reduced via a settlement to a three-day suspension. That employee's disciplinary letter says that at the time of the escape, her job was to monitor movement in the courtyard. The letter goes on to say that she placed herself in a position where she was "not able to fully monitor the movement" for both "Housing Units 8 and 9" and as a result, the two inmates "were able to run from the door of Housing Unit 9 to the containment fence and ultimately escape the institution." Once again, we can see a clear line from that employee's poor work performance to her culpability for the inmates' escape.

However, that strong correlation between the employee's poor work performance and the inmates' escape is missing in Thompson's case. There is no clear line from his work conduct as buildings and grounds superintendent to culpability for the inmates' escape like there was with the two security employees referenced above. Thus, the line in Thompson's case between his job performance and the inmates' escape is not obvious.

Before we review the specific charges against Thompson, we are first going to review the following information for the purpose of overall context.

Thompson's job description says that he is responsible for directing the institution's maintenance program "including the maintenance and repair of electronic . . . systems" Additionally, he is to "ensure the uninterrupted operation of the institution's security systems involving electronic fence detection system"

There had long been problems with the non-lethal electric perimeter fence at CCI (also known as the stun fence) that Thompson is supposed to maintain. These problems with the electric fence predate the start of Thompson's employment at CCI in 2017. Some of these ongoing problems were referenced in a DOC security audit done in 2015. That report made various recommendations to upgrade the fence, but those recommendations were not funded prior to the escape.

Notwithstanding the problems with the fence just referenced, on the day of the escape, the inmates who escaped got a non-lethal jolt of electricity as they climbed over the fence.

There had also long been problems with the alarm system connected to the stun fence. Things like snow, rain and pooling water caused the alarm system to malfunction and not work in certain areas known as zones. There are 17 zones around the perimeter of the stun fence. When the fence alarm malfunctioned in a certain zone, an alarm would go off. As already noted, even when the alarm went off the stun fence was still charged with electricity. This alarm would not sound in Thompson's office. Instead, it sounded in the prison's control center. These alarms went off so frequently and it was such a chronic problem that the control center staff would silence the alarm. This problem predated Thompson's employment at CCI.

After Thompson started his employment at CCI and became aware of the problems with the stun fence alarm system, he and his maintenance staff tried to fix the malfunctioning alarms. However, that goal proved elusive because the parts which needed to be replaced were no longer available. Consequently, fixing the alarm system was a chronic, ongoing problem. The alarm system would go off for days and weeks at a time in some zones without being fixed.

Finally, as previously noted, when the stun fence alarm went off, it would sound in the prison's control center. The control center is staffed by security staff, not maintenance staff. While the control center staff was supposed to notify maintenance staff when the alarm went off, that apparently happened so frequently that the control center staff did not routinely report it to maintenance staff. Additionally, the control center staff was supposed to notify the security director when the fence alarm sounded. Apparently, that did not happen. Additionally, the control center staff was supposed to write up incident reports documenting the alarm malfunctions. That seldom happened. None of the control center staff was disciplined for failing to report the alarm malfunctions to the supervisor and/or the security director.

Having given that overall context, the focus now turns to the charges made against Thompson. Broadly speaking, DOC accuses Thompson of being responsible for "several deficiencies with the perimeter fence, alarm system and overall communication" prior to the escape.

The first charge is that the day before the escape, "a portion of the alarm system was down [and] maintenance staff prioritized other issues and did not fix the issue the same day." In reviewing this claim, we have decided to assume for the sake of discussion that "a portion of the alarm system was down" the day before the escape because our foregoing discussion established that "a portion of the alarm system" was down much of the time. That said, DOC did not identify which portion of the alarm system was down on that day, nor did DOC establish that Thompson knew it was down. In any event, we now move to the next part of the claim which is that "maintenance prioritized other issues." For the sake of discussion, it is assumed that maintenance department employees did not work on the alarm system the day before the escape. However, the record shows that that day, the security director directed Thompson's staff to work in one of the restricted housing units on something else. Under these circumstances, Thompson cannot fairly be faulted for his staff not working on the alarm system when the security director had directed

Thompson's staff to work elsewhere that day. Thus, this charge against Thompson was not substantiated.

The next charge is that Thompson's "follow through" on fence and alarm system maintenance was deficient because he failed to report the alarm system problems to the security director and ensure that "proper documentation was made to allow for tracking of the issue." In our view, this charge contains three subparts. Each is addressed separately below.

The first subpart is whether Thompson's "follow through" was deficient. We have no trouble concluding that it was. In so finding, we are well aware that the problems with the fence and the alarm system predate Thompson's employment at CCI. Additionally, we understand that the parts needed to fix the problems were no longer available. Nonetheless, after three years of employment there, those were his problems to deal with and solve. He failed to do so because many of the fence alarms did not work properly or only worked sporadically. DOC decided to point the proverbial finger of blame at him for that systemic problem because he was in charge of maintenance at CCI. It could do that. More to the point, DOC could characterize Thompson's "follow through" on fence and alarm system maintenance as deficient. Accordingly, the Commission finds that this charge against Thompson was substantiated.

The second subpart of this claim is what we have decided to characterize as the "communication" matter. DOC contends that Thompson should have told the security director that the stun fence alarm was malfunctioning because "he was the only supervisor in possession of that knowledge." While Thompson did not tell the security director about the alarm issues, he contends he was not obligated by the existing post orders to do so. We agree with him on that point and find that DOC did not establish that Thompson was obligated at the time to tell the security director about the fence alarm malfunctions. Aside from that, it is noteworthy that Thompson did tell his supervisor about the alarm issues. Thus, the statement in the disciplinary letter that "he was the only supervisor in possession of that knowledge" is incorrect. Finally, as for the security director not knowing about the alarm system issues, that is attributable to the fact that control center staff did not report it to their supervisor, who in turn did not report it to the security director. If those employees had done what they should have done, the security director would have been aware of the alarm issues. The Commission therefore finds that the "communication" charge against Thompson was not substantiated.

The third subpart of this claim is that Thompson failed to ensure that proper documentation was made concerning the fence alarm malfunctions. We find that DOC did substantiate this claim. That is because Thompson did not have his staff record via work orders the various fence and alarm system problems which they worked on. To the extent he did not require his employees to complete work orders, he should have. DOC faults Thompson for not doing that and for not ensuring that there was proper documentation for all the fence alarm work that had been done by the maintenance staff. As DOC put it in Thompson's suspension letter, by doing that "you made it difficult to assess whether the work was completed and how often these problems arose." DOC gets to decide what information it requires of its supervisors. Here, it decided that Thompson did not adequately record certain maintenance work which it wanted recorded. It gets to make that

call. Employees who do not do the work that their employer wants them to do can fairly be criticized and disciplined for that.

The final charge is that the computer in the Buildings and Grounds Department office which generates the preventative maintenance (PM) reports had not been working for almost a year and Thompson did not report it to the security director or the warden. While Thompson did not report this computer problem to either of those people, there is no requirement that he is required to report it to them. He did report the problem to his supervisor. His doing that was sufficient. Additionally, the record shows that Thompson tried numerous options to try to remedy the problem, to no avail. This satisfies us that he did not sit on his proverbial hands regarding this matter. We therefore find that this charge against Thompson was not substantiated either.

In sum then, the Commission finds that DOC substantiated two of the charges it made against Thompson. The first was that his “follow through” on fence and alarm system maintenance was deficient. The second was that he did not require his maintenance staff to complete work orders for all the work that they performed concerning the fence alarm system malfunctions. Whenever an employee has work duties that they do not adequately perform, they can fairly be called to task for it by their employer. We therefore find that DOC could discipline Thompson for his work deficiencies and negligence in those areas.

The final question is whether Thompson’s work deficiencies and negligence in those areas warranted a five-day suspension. We find that punishment excessive for these reasons. First, Thompson had a clean disciplinary record before he was disciplined here and had not previously been suspended. Second, in DOC’s progressive disciplinary sequence, a five-day suspension is the last step before discharge. Thus, DOC decided to skip over both a one day and a three-day suspension in Thompson’s case. By taking that action, DOC decided that Thompson’s misconduct was almost as egregious as the CCI officer who was terminated for failing to see the inmates’ escape while he literally drove past them in a vehicle and was more egregious than the sergeant who ultimately got a three-day suspension for failing to see the inmates’ escape as she monitored the courtyard. In our view, Thompson’s misconduct was not remotely comparable to theirs. Third, three of the charges made against Thomson herein were not substantiated. Two of the charges were substantiated though, so a suspension is warranted for that misconduct. We find that a one-day suspension is appropriate under the just cause standard. As a result, the length of Thompson’s suspension has been modified from five days to one day. He is to be reimbursed for the difference.

Issued at Madison, Wisconsin, this 26th day of April, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman