

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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TWYNNA BIRKLEY, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0468

Case Type: PA

DECISION NO. 39002

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Appearances:

Twynna Birkley, 2019 Wisconsin Street, Sturtevant, Wisconsin, appearing on her own behalf.

Nicole Rute, 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 June 16, 2021, Twynna Birkley filed an appeal with the Wisconsin Employment Relations Commission asserting she had been suspended for one day without just cause by the State of Wisconsin Department of Corrections (DOC). The appeal was assigned to Examiner Raleigh Jones. A telephone hearing was held on August 31, 2021. The parties made oral argument at the conclusion of the hearing.

On September 9, 2021, Examiner Jones issued a Proposed Decision and Order affirming the one-day suspension by DOC. No objections were filed by the deadline given of September 14, 2021.

Being fully advised on the premises and having considered the matter, the Commission makes and issues the following:

**FINDINGS OF FACT**

1. Twynna Birkley is employed by the State of Wisconsin Department of Corrections as a correctional sergeant at the Racine Correctional Institution (RCI) and had permanent status in class when she was suspended.

2. While off duty on January 6, 2021, Birkley had a verbal altercation with her adult daughter in Birkley's car in a Walmart parking lot. During the altercation, Birkley called the police.

3. When the police responded to the 911 call, Birkley's daughter told them Birkley had threatened to shoot her with a gun that was in the car.

4. Birkley was arrested and taken to jail. She was later released from jail on bond. Birkley ultimately pled no contest to an ordinance violation of disorderly conduct and paid a fine.

5. DOC suspended Birkley for one day for the off- duty incident referenced in Findings 2 and 3.

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 suspend Twynna Birkley 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 one-day suspension of Twynna Birkley by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 6<sup>th</sup> day of October, 2021.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

Section 230.34(1)(a), Stats., states in pertinent part:

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.

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

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

Birkley's disciplinary notice stated she was suspended for the following conduct:

On January 6, 2021, you engaged in a verbal altercation with your daughter in a Walmart parking lot. You called the police. During this altercation it was reported that you threatened to shoot your daughter with a gun. You admitted to threatening to shoot you daughter after she threatened to shoot you. You admitted that your gun was in the vehicle but denied pointing the gun at her.

There is no question that the foregoing conduct occurred. Birkely admitted it.

Following the incident, the legal process played out. Birkeley was arrested and taken to jail. She was later released from jail on bond. She subsequently pled no contest to an ordinance violation and paid a fine.

DOC later suspended Birkley for one day for her conduct in the incident just referenced.

We first address the fact that Birkley was off duty at the time of the incident. That is important, of course, because there is a difference between engaging in off-duty misconduct as opposed to on-duty misconduct. Here is why. When an employee commits misconduct while on-duty, its nexus to the workplace is usually considered obvious. In contrast, when the employee commits misconduct while off-duty, the nexus to the workplace is less obvious. Because of that, the employer must show that a nexus exists between the employee's off-duty misconduct and the employer's legitimate business interests.

We find DOC showed that nexus here. Our rationale follows.

It is noted at the outset that DOC has a work rule that applies to off-duty conduct, namely work rule #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.

This work rule is very broad in that the phrase "violations or convictions of criminal or other laws" does not specify what type of violation or conviction is needed. That being so, it applies to the entire gamut of "violations or convictions" that are possible (i.e., ordinance, misdemeanor or felony).

Application of this work rule here yields the following results. Following her arrest, Birkley was charged with two ordinance violations by the Village of Greendale: endangering safety/use of a dangerous weapon, and disorderly conduct. While sometimes employers impose discipline on employees facing criminal charges before those charges are adjudicated, that did not happen here. Instead, as was its right, DOC waited until the charges against Birkley were adjudicated before it imposed discipline on her. While Birkley thinks it is significant that her ultimate conviction was for an ordinance violation of disorderly conduct, it was still something covered by work rule #25.

Aside from the nexus just identified, Birkley's suspension letter also opined on DOC's view of the proverbial big picture connection between Birkley's off duty conduct and her duties as a correctional sergeant. It provided thus:

The Department and its employees have a 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 sergeants, 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 sergeant with the DOC, you are expected to adhere to the laws of the State of Wisconsin, to set an example for the persons in our care that you supervise and foster law abiding behavior. However, your behavior on January 6, 2021 is not demonstrative of your ability to serve as such influence or example to the persons in our care and community you serve.

The Commission concurs with that reasoning. We therefore find that Birkley's off duty conduct during the January 6, 2021 incident impaired and adversely affected her ability to perform her job duties as a correctional sergeant.

Given the foregoing, the Commission concludes that Birkley engaged in misconduct for which she could be disciplined.

The focus now turns to the discipline which was imposed. Birkley contends she should have received a letter of expectation and that a one-day suspension was excessive under the circumstances. The Commission finds otherwise and concludes that a one-day suspension was not an excessive punishment for Birkley's misconduct. In so finding it is expressly noted that a one-day suspension is the first step in DOC's progressive discipline sequence.

Given the foregoing, it is concluded there was just cause for Birkley's one day suspension and it is therefore affirmed.

Issued at Madison, Wisconsin, this 6<sup>th</sup> day of October, 2021.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman