

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ADRIAN VASQUEZ, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0578

Case Type: PA

DECISION NO. 39921

Appearances:

Matt Goetch, 1381 W. Birdsong Dr. Apt A09, Oak Creek Wisconsin, appearing on behalf of Adrian Vasquez.

David Makovec, 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 24, 2023, Adrian Vasquez 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 (DOC).

A hearing was held on May 5, 2023, in Union Grove, Wisconsin, by Commission Examiner Katherine Scott. The parties made oral arguments at the end of the hearing. On June 15, 2023, Examiner Scott issued a Proposed Decision and Order affirming the three-day suspension of Vasquez by DOC. Vasquez filed objections to the Proposed Decision on June 19, 2023. DOC did not file a response by the deadline given of June 26, 2023.

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

FINDINGS OF FACT

1. Adrian Vasquez (Vasquez) is employed by the State of Wisconsin Department of Corrections (DOC) as a correctional officer at Racine Youthful Offender Correctional Facility (RYOCF). He had permanent status in class when he was suspended.

2. RYOCF hosts a monthly sweat lodge ceremony for inmates. Prior to the event, two of Vasquez's supervisors instructed him to read a security memo about the event and made a copy available for him to read.
3. Vasquez failed to read the security memo carefully, failed to ask his supervisors clarifying questions about the memo and his responsibilities during the sweat lodge event, and failed to escort and strip search inmates following the event as directed.
4. Following an investigation, DOC suspended Vasquez for three days for insubordination and failing to follow written agency policies and procedures.

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 Adrian Vasquez 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 Adrian Vasquez by the State of Wisconsin Department of Corrections is affirmed.

Issued at the City of Madison, Wisconsin, this 18th day of July 2023.

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.

Adrian Vasquez 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 Vasquez was guilty of the alleged misconduct and that the misconduct constituted just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

Vasquez was employed as a correctional officer at RYOCF. He has worked for the DOC for eight years, six of which have been at RYOCF. Vasquez worked as a housing unit officer before switching to a yard officer position in October 2022.

Once a month, RYOCF hosts a Native American sweat lodge ceremony for inmates. The ceremony is run by a volunteer and usually held in the prison yard. The volunteer brings in various items for use in the sweat lodge ceremony, some of which are contraband. These items are inventoried when the volunteer enters the institution and inventoried again when he leaves, to ensure that no items go missing during the event. The inmates are also strip-searched after the event to ensure that they have not received any contraband items.

One such event was scheduled for November 19, 2022. This was the first sweat lodge ceremony held at RYOCF since COVID-19. In preparation for the event, the chaplain – who coordinates religious volunteers – emailed a memo about security measures to supervisors at RYOCF. Vasquez’s supervisor, Sergeant Pleschette Bueno, printed out the memo and put it on her desk in the lobby. When Vasquez entered the institution that morning, both Bueno and Captain Daniel Miles told Vasquez to read the security memo. Bueno testified that she showed Vasquez the memo and had a conversation about the memo with him.

The memo read: “10. At 1:30pm K35 52 (Yard officer or officer designated by the shift commander) will report to the Sweat lodge to escort the Native American Spiritual volunteer to the lobby. 11. Inmate participants will be escort [sic] from the sweat lodge area by escort officers to Main Restrictive Housing where a strip search will be conducted prior to the inmates returning to their cells or intermingling with other offenders.” See Exhibit R-7, pg. 1.

There was no escort officer on duty that day, and Vasquez was the only yard officer on duty. Therefore, Vasquez was the only mobile officer on duty. There were no other officers who could leave their stations to escort the inmates back to their cells after the event.

Miles testified that, at 8:30 a.m. that day, he received a call from Vasquez. Vasquez asked Miles questions about the sweat lodge ceremony, which gave Miles the impression that Vasquez hadn't read the security memo. Miles then asked Vasquez whether he had read the memo, and Vasquez replied that he had "read it a little bit."

It is uncontested that, after the sweat lodge ceremony was complete, Vasquez did not escort the inmates back to their cells or strip search them. At 1:30 p.m., as the volunteer was completing the exit inventory of the items he had brought into the institution, RYOCF staff realized that a BIC lighter was missing. The institution was searched, but the lighter was never found. It was discovered that Vasquez failed to escort and strip search the inmates. Following an investigation, the DOC suspended Vasquez for three days.

Vasquez argues that his supervisors never explicitly instructed him to escort and strip-search the inmates after the ceremony. However, Vasquez was clearly instructed by not one but two supervisors to read the memo. He was given access to a copy of the memo. The memo made it clear that escort officers would escort the inmates from the event and conduct strip searches before returning them to their cells. Vasquez argues that he was a yard officer, not an escort officer, and therefore he was not responsible for conducting strip searches. However, Captain Miles and Lieutenant Casey Funk testified that yard officers are expected to take on escort officer responsibilities if there is no escort officer on duty, as was the case that day. By failing to escort and strip search the inmates, Vasquez simply failed to do his job correctly as outlined in the security memo.

Vasquez also argues that it was his first experience staffing a sweat lodge ceremony, and that he had only been a yard officer for one month when the event was held. However, Vasquez's inexperience is not exculpatory. If anything, it underscores Vasquez's responsibility to read the security memo carefully and ask his supervisors questions if he was confused. Vasquez showed a lack of diligence by failing to ask his supervisors clarifying questions about his responsibilities during the event.

Vasquez argues that he did not escort the inmates and conduct the strip searches because he was rushing to relieve an officer who had been working a long shift. However, in a correctional institution, security measures must take priority over scheduling considerations.

Vasquez's disparate treatment argument is not valid. Vasquez argues he has received disparate treatment because the volunteer has not been disciplined as harshly as he has been. An employee who raises a disparate treatment claim has the burden of proving that contention. The Commission has long recognized that disparities in discipline may, under certain circumstances, affirmatively defend against discipline despite the existence of misconduct. Underlying that position is the notion that if an employer treats one employee significantly more harshly than a similarly situated coworker for similar misconduct, inherent unfairness exists. *See Morris v. DOC*,

Dec. No. 35682-A (WERC, 7/15). A volunteer is not similarly situated to Vasquez, as volunteers are not protected by civil service law like an employee in permanent status. Further, even if they were similarly situated, there is no evidence that the volunteer failed to uphold his security obligations as outlined in the security memo.

Vasquez was insubordinate and failed to comply with written agency policies and procedures when he failed to carefully read a security memo, ask his supervisors clarifying questions about the memo, and perform strip searches on inmates following a sweat lodge ceremony. The State followed progressive discipline, following his previous one-day suspension with this three-day suspension. There was just cause for the three-day suspension, and the suspension is therefore affirmed.

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