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CIRCUIT COURT
DANE COUNTY, WI
2024CV002264

BY THE COURT:

DATE SIGNED: February 11, 2025

Electronically signed by Ann Peacock
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 12

DANE COUNTY

MALANG NJIE

Petitioner,

v.

Case No. 24-CV-2264

STATE OF WISCONSIN
EMPLOYMENT
RELATIONS
COMMISSION

WERC Decision #40383-A

Respondent.

**DECISION AND ORDER ON
PETITION FOR JUDICIAL REVIEW**

Petitioner Malang Njie seeks review of a decision by the State of Wisconsin Employment Relations Commission (WERC or Commission). In its decision, WERC found that Njie violated a policy during an interaction with a patient at Mendota Mental Health Institution. WERC further found that Njie's policy violation constituted just cause for imposition of a one-day suspension without pay. Njie argues that WERC's decision should be set aside because its finding of a policy violation is not supported by substantial evidence in the record and, thus, there was no just cause for the discipline. For the reasons set forth below, the Court sets aside WERC's decision and holds

that WERC's decision on just cause is not supported by substantial evidence in the record.

BACKGROUND

Mendota Mental Health Institute (MMHI) is a psychiatric hospital operated by the Department of Health Services (DHS), a Wisconsin state agency. (R. 532.) Njie works at MMHI. (*Id.*) At all times relevant, he held the title of Psychiatric Care Tech-Advanced and had permanent status in class. (*Id.*)

On September 24, 2023, Njie was involved in an altercation at MMHI with a coworker, Lamin Sanneh, and a patient. (R. 535.) After a DHS investigation concluded that Sanneh and Njie had violated four State of Wisconsin work rules, DHS issued a five-day suspension for Njie. (*Id.*) Njie appealed the disciplinary decision. (R. 531.) The parties presented evidence and argument before a WERC Examiner at a hearing on May 6, 2024, and a continued hearing via Zoom on May 13, 2024. (*Id.*) On June 14, 2024, the WERC Examiner issued a Proposed Decision and Order. (R. 511-516.) Njie filed objections to the Examiner's Proposed Decision and Order, to which DHS responded and Njie replied. (R. 531.) On July 2, 2024, the Commission issued a Decision and Order finding that Njie had violated one State of Wisconsin work rule¹ and it modified DHS's discipline from a five-day suspension to a one-day suspension. (R. 531-536.)

Based on evidence presented by Njie and DHS before the WERC Examiner, the Commission made the following findings of fact relating to the altercation that served as the basis for the discipline:

On September 24, 2023, Njie and his coworker, Lamin Sanneh (Sanneh), escorted an agitated patient to a "chill out" room after the patient became disruptive and profane around other patients and staff members. After walking down the hall, the patient enters his room and closes the door behind him, but then cracks the door open a few inches to reach out and flip on his light switch, located just outside his door. Sanneh places his hand onto the outside handle of the door and holds on for safety reasons and instructs the patient

¹ WERC found a violation of the work rule "failure to comply with the written agency policies or procedures." (R. 535.) WERC determined that Njie did not violate the other three work rules cited by DHS. (*Id.*)

that his room time would be extended each time he opens the door. As Sanneh and the patient are talking, the door slowly inches closer to being closed, with only the patient's arm sticking out, and one hand on the light switch. The patient then fully retracts his arm and hand, as he is now completely inside the room.

Throughout this interaction between Sanneh and the patient, Njie is standing about eight feet away from them, observing. The moment the patient is completely inside his room, with the door cracked open an inch or two, Njie approaches the door within a foot, while Sanneh swings the door wide open. Njie reaches forward with an upward motion with his left hand toward the patient's face. The patient reacts by leaning back as Njie reaches for him, then appears stunned for a second. Njie steps back a foot. At this point, both Sanneh and Njie are about two feet away from the patient. The patient appears to say something as Sanneh moves towards him within a foot. As Sanneh gets closer, the patient makes a fist with his right hand and swings straight at Sanneh. The patient misses Sanneh, but then moves forward towards Njie and takes a few swings at Njie. Sanneh immediately wraps his right arm around the patient's neck and decentralizes the patient to the ground. Sanneh and Njie restrain the patient, joined by other staff. A spit mask was then placed on the patient.

(R. 534.) In addition to other evidence, WERC relied on video of the incident and noted “the video footage of the incident . . . can be viewed frame by frame within a few hundredths of a second.”

(R. 535.)

WERC found that “Njie failed to comply with MMHI’s Intervention Options Continuum (IOC) Policy when he chose to approach an agitated patient by reaching forward with his left hand toward the patient’s face, escalating the situation.” (R. 534.) WERC found that Njie’s violation of the policy established just cause to impose a one-day suspension. (*Id.*)

DISCUSSION

Judicial review of an agency’s decision is confined to the record. Wis. Stat. § 227.57(1). The party challenging the agency’s decision bears the burden to overturn the decision. *See City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). Judicial review of an agency’s decision may be challenged on several grounds. *See* Wis. Stat. § 227.57(4)-(8). Njie argues that WERC’s decision on just cause, which was based on a finding of a policy violation, was not supported by substantial evidence. (Petitioner’s Br. in Support, Dkt. 39 at p. 1, 10.)

The Court concludes that WERC's finding of a policy violation is not supported by substantial evidence in the record and, thus, it must set aside WERC's action or remand it. Wis. Stat. § 227.57(6).

A. WERC's determination of just cause depends on findings that are not supported by substantial evidence in the record.

1. An agency's findings of fact are affirmed if they are supported by substantial evidence.

In reviewing a finding of fact, Wisconsin Stat. § 227.57(6) instructs that the reviewing court does not substitute its judgment for the agency's judgment unless the finding of fact is not supported by substantial evidence:

If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Id. “A factual finding is supported by substantial evidence if, ‘after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact.’” *Radtke v. Lab. & Indus. Rev. Comm'n*, No. 2024AP332, 2025 WL 262295, at *4 (Wis. Ct. App. Jan. 22, 2025) (quoting *Wisconsin Bell, Inc. v. LIRC*, 2018 WI 76, ¶30, 382 Wis. 2d 624). “Thus, the Commission's findings may be set aside only when a reasonable factfinder could not have reached the findings from all the evidence that was before it, including the available inferences from that evidence.” *Id.* (citing *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶25, 293 Wis. 2d 1, 717 N.W.2d 166).

2. The record does not contain substantial evidence to support WERC's finding of a policy violation.

MMHI's IOC policy provides in pertinent part: “Staff shall only use the amount of force necessary to safely contain a situation . . . All MMHI staff trained in IOC are expected to employ

verbal techniques to diffuse potentially dangerous situations.” (R. 535.) WERC found “Njie failed to comply with MMHI’s [IOC] Policy when he chose to approach an agitated patient by reaching forward with his left hand toward the patient’s face, escalating the situation.” (R. 534.) In its memorandum accompanying the decision, WERC explained its reasoning with respect to the IOC policy violation:

Credible testimony and evidence from DHS established that the expectation for both Njie and Sanneh was to attempt to deescalate the situation. *Once the patient was completely in his room, the situation was under control. At that point, Sanneh or Njie could have shut the patient’s door and secured it from opening. The video evidence shows that that peaceful option was available to both Sanneh and Njie to safely contain the situation.* Njie’s conduct, by approaching the patient’s door and reaching forward toward the patient’s face with his left hand, escalated the situation. Sanneh swinging open the door along with Njie’s movement forward, were the catalyst that turned the verbal interaction into a physical takedown. Instead of diffusing the situation, Njie and Sanneh exacerbated it. Thus, the Commission is persuaded that Njie violated State of Wisconsin work rule #2, specifically MMHI’s IOC Policy, when he failed to verbally diffuse a potentially dangerous situation with an agitated patient, and instead chose to reach forward toward the patient’s face, unnecessarily escalating and provoking the patient. Accordingly, misconduct has been established.

(R. 536 (emphasis added).)

As noted by WERC, the record includes video of the incident. The Court reviewed this video while conducting its review of the record to verify whether substantial evidence supports WERC’s findings of fact. The video shows that the patient arrives at his room at 2:03:08.043 and Sanneh arrives at his room at 2:03:10.171.² Sanneh puts his hand on the doorknob to close the door, but the patient has his left hand on the doorknob on the other side of the door and appears to be pushing towards Sanneh in an effort to prevent the door from being closed. The patient also appears to put his right foot towards the door in an effort to prevent the door from closing. At the same time that the patient is preventing the door from being closed, Sanneh clearly uses pressure to try to close the door but is unsuccessful based on the patient’s placement at the door. The

² All video references are the East B Hallway Near Gate Camera 1. (R. 37, Video Exhibit flash drive.)

patient's right hand was outside of the door and remained outside of the door or in the door jamb until at least 2:03:16.021. Closing the door before that point of time would have crushed the patient's right hand. At 2:03:16.021, the patient brings his right hand into his room, but keeps his left hand on the doorknob and still appears to be using pressure to prevent the door from being shut. It is this same point of time when Njie has moved close enough to the door to be within arm's reach of the door. By 2:03:16.387 at the latest, Sanneh starts opening the door. Only after Sanneh starts opening the door, which exposes Njie to the patient's spitting, does Njie raise his hand towards the patient's face.

WERC's finding that Njie violated the IOC policy was based on its finding that Njie moved towards the patient—who was in the doorway—instead of safely closing the door. This finding of an IOC policy violation is inherently contradictory and not supported by substantial evidence. A reasonable factfinder could not have reached that finding from all the evidence that was before it, including the available inferences from that evidence. WERC acknowledged that “it is reasonable that Njie was raising his hand to block the spit.” (R. 536.) Nevertheless, WERC found that Njie violated the use of force policy because he was moving towards the patient in the doorway with his hand raised. In making this finding, WERC explained that Njie violated the policy because he should have closed the door instead of moving towards the patient in the doorway with his hand raised. (*Id.*) But WERC doesn't explain how one closes a door without moving towards it.

To the extent that the failure to close the door was a violation of the policy, Njie is correct that just cause requires more than finding him “guilty by association.” (Dkt. 41, Pet. Reply Br. at 4.) The video evidence clearly establishes that Njie was not in a position to close the door. Specifically, the patient entered the room, but actively prevented Sanneh from closing the door to his room. The patient placed his right hand outside the door jamb and kept it there, preventing

Sanneh, who had his hand on the door, from safely closing it. There was too little time, less than half a second, between when the patient moved his hand into the room and when Sanneh started to open the door. Furthermore, the only person who was even somewhat arguably in a position to successfully close the door during that split second of time was Sanneh, not Njie.

Tellingly, WERC’s brief in the instant action acknowledges that Njie wasn’t in control of the door and suggests that Njie should have deescalated the situation in a different manner. Specifically, WERC argues that “Njie, *who was not in control of the door*, could have backed away from the doorway to avoid the spittle, but he chose instead to move closer to the patient and thrust his hand into the agitated patient’s face.” (Dkt. 40, Resp. Brief at 11 (emphasis added).) This new position conflicts with WERC’s finding that “Sanneh *or* Njie could have shut the patient’s door and secured it from opening. . . that peaceful option was available to *both* Sanneh *and* Njie to safely contain the situation.” (R. 536 (emphasis added).)

Because reasonable minds could not arrive at the same conclusion as WERC—that Njie violated the policy by moving towards the patient with his hand raised to block spit instead of closing a door he did not have control of—the Court finds the agency’s decision is not supported by substantial evidence. Without a violation of policy, there was no just cause for discipline.

B. Njie’s requests for relief are granted.

While conducting judicial review of an administrative decision, a court shall “provide whatever relief is appropriate.” Wis. Stat. § 227.20(9). Njie requests three forms of relief: (1) modification of WERC’s order imposing a one-day suspension; (2) award of back pay; and (3) award of Njie attorney’s fees. Because the Court finds WERC lacked substantial evidence supporting its finding that Njie could have avoided escalating a patient interaction, the Court sets aside WERC’s order finding just cause for a one-day suspension and an award of backpay is

appropriate.

As for Njie's request for attorney's fees, where an individual is a prevailing party in an action for judicial review under chapter 227, "the court shall make the findings applicable under s. 814.245 and, if appropriate, award costs related to that proceeding under s. 814.245 . . ." Wis. Stat. § 227.485(6). Wisconsin Stat. § 814.245(3) authorizes the award of attorney fees against a state agency:

Except as provided in s. 814.25, if an individual, a small nonprofit corporation or a small business is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

See also Wisconsin Stat. § 814.245(5) (enumerating allowable costs). Thus, the court must determine whether the state agency was justified in its position or if special circumstances exist. Both §§ 227.485 and 814.245 define "substantially justified" as "having a reasonable basis in law and fact." *See* Wis. Stat. §§ 227.425(2)(f) and 814.245(2)(e).

As an individual who is the prevailing party against a state agency in a chapter 227 action, Njie shall be awarded attorney's fees unless the Court finds the agency was substantially justified in its position or special circumstances exist making the award of such expenses unjust. Here, the agency cannot meet its burden to show that its position was substantially justified. Based on the video evidence, no reasonable person could find Njie failed to comply with MMHI's IOC Policy. Therefore, the Court awards Njie costs and attorney's fees pursuant to Wis. Stat. § 227.485(6).

CONCLUSION

For the reasons set forth above, the Court sets aside WERC's decision finding just cause to suspend Njie for one day without pay. Further, the Court hereby orders the following: (1) Njie

is entitled to receive back pay for the suspension; and (2) Njie is entitled to costs and attorney's fees.

On or before February 24, 2025, the Petitioner shall submit an itemization of costs and attorney's fees. If the Respondent has any objection to that itemization, the Respondent may file a response to the itemization on or before March 10, 2025.