

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JESSICA GAMES, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0643

Case Type: PA

DECISION NO. 40403

Appearances:

Kayla Pompey, 7277 W. Marine Drive, Milwaukee, Wisconsin, appearing on behalf of Jessica Games.

Davis 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 May 28, 2024, Jessica Games filed an appeal with the Wisconsin Employment Relations Commission asserting that she had been suspended for one day without just cause by the State of Wisconsin Department of Corrections (DOC). The appeal was assigned to Commission attorney Peter G. Davis to serve as hearing examiner.

A zoom hearing was held on July 17, 2024. The parties made a closing argument at the conclusion of the hearing. On July 26, 2024, Examiner Davis issued a Proposed Decision and Order rejecting the one-day suspension of Jessica Games by the DOC. On July 28, 2024, DOC filed objections to the Proposed Decision and on August 1, 2024, Games filed a response.

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

FINDINGS OF FACT

1. Jessica Games, herein Games, is currently a Sergeant at the Taycheedah Correctional Institution. She had permanent status in class at the time of her suspension.

2. On January 21, 2024, Games was working at the Milwaukee Women's Correctional Center (Center) and responsible for checking in employees and visitors.

3. Center employees are required to successfully pass thru a metal detector when they report for work. Correctional Officer U successfully passed thru the detector. Sergeant J followed employee U and failed the metal detector test three times. She believed her boots were the problem. It was unclear if a hand wand was functional and could have been used to check the boots. Employee J did not want to take off her boots as the floor was dirty and wet. Games unlocked the door for employee U and employee J followed U thru the door and entered the facility. Employee J then asked control area Sergeant M to wand her boots. Employee M did so, and it was determined that the boots were the cause of employee J's failure to pass the metal detector. Employee J then entered the facility and relieved employee M whose double shift had ended. Approximately four hours later into the shift, Games reported the incident to a supervisor. Neither employee J nor employee M reported the incident.

4. Existing policy dictates that the employee cannot enter the facility if they fail the metal detector test. Existing policy dictates that such an employee be sent home as unfit for duty or kept out of the facility until a supervisor is called for direction. Games did not follow the policy. Games received a one-day suspension.

5. Employee J and employee M were interviewed as part of the investigation into the incident. Employee J and employee M were not disciplined although they also failed to act in compliance with the entrance policy.¹

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 did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Jessica Games

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

¹ The Commission finds itself in an absurd position due to the advocacy choices of DOC in this matter. J was indeed disciplined. J's discipline was also appealed to WERC and, in that matter, WERC affirmed the discipline. That is how WERC is aware of J's discipline. However, DOC failed to provide that critical information in the record made in Games' hearing. DOC only brought up J's discipline in an objection to the proposed decision, once the record was closed. WERC is not able to go outside of the confines of the record established at hearing. To take notice of facts presented in other hearings would deprive Games or other parties of due process and her/their ability to cross examine or otherwise offer rebuttal evidence or testimony. Therefore, due to DOC not providing an accurate record, we are bound to make a Finding of Fact that the record of this hearing supports while WERC knows from external resources to be incorrect.

ORDER

The suspension of Jessica Games by the State of Wisconsin Department of Corrections is rejected. Games shall be made whole with interest.²

Issued at Madison, Wisconsin, this 24th day of September 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

² See Wis. Admin. Code § ERC 94.07.

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.

Jessica Games 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 Games 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).

It is clear that Games did not follow the entrance policy when she did not stop employee J from entering the facility after J failed to pass the metal detector test. While that failure is mitigated by the awkwardness of one Sergeant ordering another Sergeant to stop (particularly in the context of some past personal issues between the two), it is nonetheless misconduct-although Games should be commended for subsequently reporting the incident to supervision.

What is troubling is the DOC determination that there was no misconduct and no discipline for employees J and M. Employee J knew she had failed the entrance test but chose to enter anyway. Employee M knew or should have known (why else would employee J ask to be wanded?) that employee J had improperly entered the facility and yet took no action. Neither employee reported the incident to supervision.

All three employees violated the entrance policy in various ways but only one was disciplined. The absence of discipline for employees J and M constitutes disparate treatment that violates the just cause standard and thus provides a persuasive basis to reject the discipline imposed on Games.³ She shall be made whole with interest.

Issued at Madison, Wisconsin, this 24th day of September 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

³ See FN1.