

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHELLE MCGUIRE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0156

Case Type: PA

DECISION NO. 40684

Appearances:

Colin B. Good, Attorney, Hawks Quindel S.C., P.O. Box 2155, Madison, Wisconsin, appearing on behalf of Michelle McGuire.

Nicole Rute, 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 Health Services.

DECISION AND ORDER

On July 10, 2024, Michelle McGuire filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Health Services (DHS). The matter was assigned to Commission Examiner Anfin J. Wise.

A zoom hearing was held on September 26 and October 1, 2024, by Examiner Wise. The parties submitted written closing argument on October 10, 2024. The Respondent filed a written response on October 11, 2024.

On October 24, 2024, Examiner Wise issued a Proposed Decision and Order affirming the discharge of Michelle McGuire by the DHS. McGuire filed objections to the Proposed Decision on October 29, 2024. DHS filed a response to the objections on November 4, 2024.

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

FINDINGS OF FACT

1. Michelle McGuire (McGuire) was employed by the State of Wisconsin Department of Health Services as a Psychological Associate. She had permanent status in class when she was discharged.

2. The Department of Health Services (DHS) is a State agency.
3. Since 2010, McGuire has struggled with interpersonal communication with coworkers and taking responsibility for her conduct.
4. From 2010 through 2023, McGuire's annual performance evaluation or Performance Expectations and Planning (PEP) showed a variety of concerns, including interpersonal relationships, client interactions, interactions with coworkers, communication, teamwork and accountability, treatment of others, and maintaining professional conduct.
5. McGuire's performance deficiencies continued into 2024.
6. On February 16, 2024, McGuire received an overall unsatisfactory performance rating on her annual PEP. She was subsequently placed on a Performance Improvement Plan (PIP) to assist her in bringing her performance up to a satisfactory level.
7. Despite a considerable investment in resources, ongoing feedback, and guidance from management, McGuire consistently failed to meet the performance standards outlined in her PIP, including her performance deficiencies related to accountability, communication, customer service, interpersonal skills, decision-making and judgment, equity and inclusion, and leadership skills.
8. On June 4, 2024, DHS discharged McGuire for her continued failure to attain minimally acceptable standards in her job as a Psychological Associate.

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 § 230.44(1)(c), Stats.
2. The State of Wisconsin Department of Health Services had just cause within the meaning of § 230.34(1)(a), Stats., to discharge Michelle McGuire.

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

ORDER

The discharge of Michelle McGuire by the State of Wisconsin Department of Health Services is affirmed.

Issued at Madison, Wisconsin, this 6th day of November 2024.

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.

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

The State has the burden of proof to establish that McGuire committed acts which constitute just cause for her termination. In determining whether certain conduct constitutes just cause, the test set forth by the Wisconsin Supreme Court in *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974), provides whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair the performance of the duties of the position or the efficiency of the group with which the employee works. *See also Del. Frate v. Department of Corrections*, Dec. No. 30795 (WERC, 2/04). Additionally, in *Safransky*, the Court held that “the degree to which [the conduct] did or could reasonably be said to have a tendency to impair the employer’s operation” is one of the factors to consider. Actual impairment is not a requirement. *Id.*

The Commission has held that a discharge for poor performance was not excessive where the record shows that the employer had “devoted considerable resources to its attempt to improve Appellant’s performance to a satisfactory level and that, despite this, Appellant’s performance did not improve to this level. *See, Rufener v. DNR*, 93-0074-PC-ER, ETC., 8/4/95. In *William Ruff v. State Personnel Commission*, Cir. Ct. of Dane County, Case No. 81-CV-4455 (7/23/82), Aff’d Wis. Ct. App., Case No. 82-1572 (Dist IV, 11/8/83), the court held that it is only right that a person in public service be expected to perform the tasks of their position and if they cannot or will not perform, the public service suffers and it is reasonable to discharge that person.

McGuire was employed as a Psychological Associate at Northern Wisconsin Center (NWC), a short-term assessment and treatment facility, operated by DHS, for individuals who have an intellectual disability as well as a mental illness and aggressive or challenging behaviors. The programming is designed to assist clients in developing the skills necessary to live in a community setting with as much independence as possible. As a Psychological Associate, McGuire’s primary responsibility was the design and implementation of individual or group treatment/counseling programs or BTPs, using the entire spectrum of available behavioral management and clinical techniques. McGuire was also responsible for the clinical treatment of individuals with dual diagnoses, including conducting functional analysis and providing direction

for implementation of individualized and specialized treatment programs. A Psychological Associate also participates in the pre-admission screening process, develops and teaches staff development courses, serves on facility committees, and provides direction to the Psychological Services Technician. Psychological services are provided in an independent, professional manner with professional consultation and quality control provided by the Director of the facility. Psychological Associates must have the ability to work effectively as a member of an interdisciplinary team, the ability to effectively communicate verbally and in writing, and the ability to function effectively with limited supervision.

Like all State employees, McGuire has had annual performance reviews conducted to evaluate her job performance, also known as Performance Expectations and Planning (PEP). The purpose of PEPs is to identify competency and performance expectations necessary to achieve satisfactory job performance and to record results. The Department then maintains these PEP results and other records in an employee's personnel file.

Performance deficiencies and concerns about her interpersonal communication and accountability for her behavior date as far back as 2010, and only continued to decline, along with other issues, in her most recent annual review dated February 16, 2024. The review indicated a rating of "Unsatisfactory Performance" in five out of the seven Wisconsin Core Competencies: *Accountability, Communication, Customer Service, Decision-Making/Judgment, and Leadership Skills*. The review also indicated a rating of "Progress Necessary" for the remaining two Wisconsin Core Competencies: *Interpersonal Skills* and *Equity and Inclusion*. For her Individual Goals, the review indicated a rating of "Unsatisfactory Performance in 1:1 Client Interactions", and a rating of "Progress Necessary" for *Behavior Treatment Programs/Train BTPs* and *Leadership During Crisis Interventions*.

For *Accountability*, the review specified the following:

Michelle struggles with accepting responsibility for her performance without blaming others and following through on work assignments. Michelle demonstrates opposition to assignments and attempts to shift her assignments to others. Michelle does not always show willingness to be accountable for or to complete a task that is being delegated by her supervisor...

For *Communication*, the review indicated:

Michelle's communication style fails to meet expectations when it comes to interpersonal communication. Michelle's communication with coworkers makes staff feel she is "talking down to" them. She is described by coworkers as often using a condescending tone. This has been addressed in Michelle's past PEPs and in a Letter of Expectation dated February 28, 2023. She has not shown acceptable improvement. When Michelle is in a conversation she doesn't want to participate in with the interdisciplinary teams, she is often flippant and dismissive. This is frustrating to those she is communicating with and doesn't facilitate any true team building discussions.

Coworkers have expressed frustration with unclear guidance or overly technical writing in Behavioral Treatment Programs that Michelle has written. Michelle has not tailored her communication style or method, written or verbal, to meet the needs of her coworkers so that they can better understand the lengthy behavior treatment programs. Michelle will often respond to questions about clients from coworkers with “it’s in the BTP” or “read the BTP” instead of verbally or in e-mail answering their questions and clarifying what they are asking about. Michelle needs to learn to adjust or tailor her communication style or method to ensure she is understood by her coworkers and needs to freely share information with coworkers as needed. Michelle must be approachable so that coworkers will feel comfortable to come to her with questions without fear of a negative or dismissive response.

In group emails, Michelle often communicates by undermining the work performance of supervisors and administration...

Michelle hasn’t shown improvement in her communication with coworkers even after being coached by supervisors. Michelle has been coached by her previous supervisor on 4/5/21, 6/14/21 and this writer, her current supervisor, on 3/1/23 and 3/27/23 about her communication with coworkers. Michelle’s communication with her coworkers has also been addressed in a Letter of Expectation on 2/28/23 and in her past PEPs on 4/1/22 and 3/27/23. Michelle must consider how others perceive her communication, be mindful of her word choices, and adjust her tone to avoid coming across as condescending and belittling. Michelle can improve by communicating with a team approach instead of with a group vs group approach. Michelle can also improve on becoming a better listener. Michelle gets defensive or deflective when differing viewpoints or job improvement ideas are expressed. Michelle would benefit by having a constructive conversation and working together to come up with a positive solution.

For *Customer Service*, the review detailed the following:

Michelle needs to spend more time interacting with clients and helping direct care staff with learning and implementing BRPs to provide better customer service for clients and staff. On 1/13/23 there was a meeting with Michelle, Director Jay Dressler, and this writer about Michelle spending more time helping direct care staff with implementing BTPs for the clients. On 5/30/23 Michelle was reminded by Director Jay Dressler about the expectation that she needs to spend more time on the unit interacting with clients and staff on a daily basis. This was also address in an LOE on 9/15/23...

If Michelle is not spending time with staff and clients consistently on a regular basis, she does not know if her BTPs are effective or if they need revision or updating to better serve and impact our clients...

Michelle’s customer service is also lacking when she is asked questions by staff, and she gives a dismissive response of “it is in the BTP” or “Did you read the BTP?”

This type of response doesn't account for the different learning styles of staff and there may be a need for verbal explanation or answers. Our facility is focused on training clients and staff to deal with maladaptive behaviors, and Michelle plays a key role in this area which requires her to have good customer service skills, both with clients and with staff. This kind of response has caused staff to be reluctant to ask Michelle further questions when they predict her answer will be "it is in the BTP."

One final area that demonstrates opportunity for improvement in customer service is responding to alarms or maladaptive behaviors. On 5/30/23, the Director gave Michelle an expectation that she must respond to all building alarms immediately, unless there was a compelling reason otherwise. Michelle is not complying with that directive, and she does not consistently respond to alarms...This was addressed in an LOE on 9/15/23...Michelle has not shown improvement in responding to alarms or class for extra staff even after being given expectations to do so.

For *Decision-Making/Judgment*, the review specified:

Michelle serves as "on call" Psychological Associate outside of her core hours. Michelle is contacted and receives questions from staff at the facility after hours occasionally on how to handle behavioral situations related to BTPs. Michelle appears to have the interests of clients in mind with the decisions she makes when she is contacted outside of her core hours. However, Michelle's decisions can be stifling to the positive changes that the facility is implementing. NWC is actively trying to increase our census, which is a positive change and beneficial to the community and families of the clients that desperately need our assistance. Michelle often attempts to put up roadblocks for all potential clients, saying that they are not appropriate for NWC instead of trying to work with the team to research clients to ensure they are accurately considered before just saying they are not appropriate. This shows poor decision making in helping NWC accomplish the mission of increasing our census.

On 2/8/24 Michelle misrepresented her involvement and what the psychiatrist said during TTR review on 2/7/24...She had no firsthand knowledge about what was said in the TTRs. Michelle acted as though she had been there and was reporting things she heard the Psychiatrist say. She gave false information and perpetuated a lie when she told Leadership that the Psychiatrist said things he did not say...Michelle was speaking for him about things she had no idea about, mischaracterizing him. This was not only disrespectful to our psychiatrist, but it also does not contribute to positive change in accomplishing NWC objectives or building trust with colleagues.

...poor decision making, inability to effectively prioritize, and lack of good judgement by Michelle.

For *Leadership Skills*, the review stated the following:

Although Michelle is not a supervisor, she is a high-level professional employee and is looked to as a leader in the EXCEL program. Staff look to her for guidance and direction related to behavior treatment programs. Michelle needs to be supportive while coaching and teaching staff Behavior Management Techniques and the implementation of Behavior Programs. Michelle must improve in this area by attending cross shift on a regular basis, which she is not currently doing...

She can also improve by providing support, guidance, and positive solutions to direct care staff, supervisors, and management instead of criticizing the work performance of others. Michelle deflects and shifts blame onto others instead of taking ownership, making amends when things go wrong, and working together as a team to resolve an issue. Michelle is not showing leadership skills and is not showing herself as a positive role model and mentor to staff and clients...

Michelle is not acting as a positive leader and contributing to a positive work environment. Her coworkers do not feel she is approachable or open to questions and feedback.

The summary of her overall "Unsatisfactory Performance" rating stated the following:

During this review period Michelle has not accepted responsibility for duties assigned to her and has instead blamed others or shifted responsibility for her work assignments to others. She has been resistant to direction from supervisors. Her written and verbal communication continue to be condescending. Michelle does not treat other members of the team as equals if she perceives that they are less educated than she is. This creates division within the team. She has failed to respond and assist team members when clients are exhibiting maladaptive behaviors. She has made insensitive remarks to direct care staff which demonstrated a lack of empathy, respect, and understanding. Michelle has failed to provide leadership even though she is in a high-level position and could have a significant impact on the program.

The issues raised in the most recent performance review were similar concerns that had been raised since 2010. McGuire was having problems with some of the core responsibilities of her position and more importantly, the core competencies for employees across the Department. It was clear that McGuire was not being successful in her position. Because of her unsatisfactory performance rating on her 2024 PEP, McGuire was immediately placed on a formal Performance Improvement Plan (PIP).

The PIP focused on McGuire improving her accountability, communication, customer service, decision-making/judgment, respectful interactions with staff and supervisors, leadership, and client interactions. Goals in each area in need of improvement were identified. Status of the PIP were documented every few weeks.

During the first reporting period, February 16–March 8, 2024, McGuire had unsatisfactory performance in the areas of accountability and communication, and progress necessary in customer service. She had successful performance in interpersonal relationships, decision-

making/judgment, general leadership, behavior treatment programs, and leadership during crisis. During the second reporting period, March 8–March 29, 2024, and the third reporting period, March 29–April 12, 2024, McGuire showed she was making the necessary changes and successfully performing her job. Her supervisors were hopeful that the PIP process was working. However, accountability, communication issues with staff and management, and interpersonal relationship problems resurfaced during the fourth reporting period, April 12–April 26, 2024. Additionally, during this reporting period, the results of a Respectful Workplace Complaint (RWC) found that McGuire was responsible for creating a hostile work environment. She was therefore rated as unsatisfactory in the area of equity and inclusion.

During the next reporting period, April 26–May 10, 2024, McGuire’s performance was rated unsatisfactory in the areas of accountability, equity and inclusion, and leadership skills. She was also rated as progress necessary for communication, customer service, interpersonal skills, and decision-making/judgment. Her failure to take accountability for her actions and the way she treats others was again the reoccurring theme. She continued her discourteous treatment of her supervisor, being disrespectful to coworkers, and failed to be mindful of her work choices and condescending tone. While there were initial signs of improvement, McGuire was unable to consistently sustain her improved behavior.

The record establishes that McGuire has consistently failed to meet performance standards. Because of her unsatisfactory performance on her PEP dated February 16, 2024, the Department placed McGuire on a formal PIP to address her performance deficiencies. During the PIP, McGuire received extensive feedback and guidance from her supervisor, Craig Koehler. Unfortunately, her work performance did not consistently improve to satisfactory standards. Consequently, the Department terminated McGuire for her failure to attain minimally acceptable standards in her job as a Psychological Associate on June 4, 2024.

McGuire’s continued failure to meet performance standards had a tendency to harm the business operations and impair the efficacy of the Department as a therapeutic agency and those working with her. NWC cares for some of the most dangerous and challenging individuals in the State. In order to provide the best care to the clients it serves, the staff must trust each other and work as a team. When a staff member is treating others disrespectfully and condescendingly, the effect is countertherapeutic. It has the potential to impact the Department’s services to the clients and thus, impacting the State because people are not working together. It can also be dangerous. Furthermore, when staff are contributing to or creating a hostile work environment, it has the tendency to impact the operations of an employer. No one wants to work in that type of environment, which can lead to retention issues that can impact the treatment of the client and the overall mission of the Department.

The focus now turns to McGuire’s defenses.

First, McGuire contends she was only placed on a PIP shortly after she submitted a formal complaint about the leadership of the facility’s then-director, Jay Dressler. However, credible testimony and evidence show that McGuire had a significant history of performance concerns dating as far back as 2010. The record established that she struggled with communication issues and her treatment of coworkers, supervisors, and management for over a decade. The PIP was

initiated to bring her unsatisfactory performance to acceptable standards in the core competencies, including accountability, communication, interpersonal skills, customer service, leadership, decision-making/judgment, and equity and inclusion.

Second, McGuire claims that the Department excluded positive performance reviews and fabricated negative and untruthful ones to support its predetermined decision to discharge her, however, did not offer any testimony or evidence to support her claim.

Third, McGuire argues that the PIP set McGuire up to fail because it did not provide her with the specifics as to how she could successfully complete it. On the contrary, the evidence and testimony showed that goals were established for each area of improvement, which were documented on the bi-weekly reports. There is also a written explanation to specify successful performance in the areas in need of improvement. It also appears that McGuire was aware of how to perform successfully, as she was able to attain a satisfactory rating in some areas during a few of the PIP reporting periods.

Finally, McGuire notes that Chapter 464 of the Wisconsin Human Resources Handbook specifically forbids using a PIP to correct inappropriate behavioral conduct or a violation of work rules. Section 464.010 states that a “PIP concentrates on communication between management and the employee, clarifying objectives and expectations, and identifying training needs. A PIP is not to be used to correct inappropriate behavioral conduct or violation of work rules. Work rule violations will be addressed through other existing means, such as progressive discipline.” While the Commission acknowledges that some of McGuire’s performance concerns could be categorized as inappropriate behavioral conduct or a violation of work rules, the record clearly established that McGuire was unable to satisfactorily perform her job’s core competencies, including accountability, communication, customer service, decision-making/judgment, and leadership skills. When a state employee fails to attain minimally acceptable standards in their positions, a PIP is appropriate.

Accordingly, the Commission concludes there was just cause to discharge McGuire for poor work performance or her failure to attain minimally acceptable standards in her job as a Psychological Associate.

Issued at Madison, Wisconsin, this 6th day of November 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman