

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PAWEL KURKOWSKI, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0661

Case Type: PA

DECISION NO. 40691

Appearances:

Kostas Korias, c/o Dodge Correctional Institution, 1 W. Lincoln Street, Waupun, Wisconsin, appearing on behalf of Pawel Kurkowski.

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 July 25, 2024, Pawel Kurkowski filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for five days without just cause by the State of Wisconsin Department of Corrections (DOC). The matter was assigned to Commission Examiner Anfin J. Wise.

A hearing was held on September 30, 2024, by Examiner Wise. The parties made oral argument at the end of the hearing. The record was held open for additional documentation. On October 2, 2024, the DOC filed additional exhibits. On October 3, 2024, Kurkowski filed a written argument in response to the DOC's additional exhibits. The DOC did not file a reply by the given deadline of October 4, 2024.

On November 4, 2024, Examiner Wise issued a Proposed Decision and Order rejecting the five-day suspension of Kurkowski by the DOC, concluding the DOC did have just cause for a three-day suspension of Kurkowski. Both Kurkowski and the DOC filed objections to the Proposed Decision on November 11, 2024; the DOC also filed a response to Kurkowski's objections on that same day.

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

FINDINGS OF FACT

1. Pawel Kurkowski is employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Officer at Green Bay Correctional Institution (GBCI), and he had permanent status in class at the time of his suspension.

2. GBCI is a correctional facility located in Green Bay, Wisconsin operated by DOC, a state agency of the State of Wisconsin.

3. On January 12, 2024, Kurkowski was unprofessional and discourteous to an inmate who threatened self-harm.

4. Kurkowski was grossly negligent in his duties when he failed to take immediate action to prevent any self-harming behavior after the inmate threatened self-harm.

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 Pawel Kurkowski for five days, but did have just cause to suspend him 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 five-day suspension of Pawel Kurkowski by the State of Wisconsin Department of Corrections shall be modified to a three-day suspension, and he shall be made whole for the difference with interest.¹

Issued at Madison, Wisconsin, this 21st day of November 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ 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.

Pawel Kurkowski 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 Kurkowski 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).

On January 12, 2024, at around 10:05 pm, Kurkowski had the following communication exchange with inmate J.S.:

Inmate: "...where are my meds at?"
Kurkowski: "What?"
Inmate: "Where are my meds at?"
Kurkowski: "I have no idea."
Inmate: (unintelligible)... "...kill myself..."
Kurkowski: "What's that?"
Inmate: "Do you want me to kill myself?"
Kurkowski: "You do what you gotta do, man."
Inmate: "Oh, so you want me to kill myself?"
Kurkowski: "That's not what I said."

As Kurkowski says, "that's not what I said," he is already walking away from J.S.'s cell front and continues down the unit hallway. Approximately 17 minutes later, Kurkowski walks by J.S.'s cell and observes J.S. making superficial scratches on his arm. Kurkowski then calls for a Sergeant to come assist. For about the next 20 minutes, Kurkowski remains at J.S.'s cell front and maintains a visual. J.S. continues scratching his arm with an unknown sharp object, maybe a fingernail. Kurkowski does not tell J.S. to stop harming himself, does not ask J.S. to hand out the unknown object, and does not turn the cell light on for a better look. Kurkowski did not believe any use of force, even brandishing OC spray, was justifiable under the circumstances, given what appeared to be, insignificant and superficial injuries.

DOC asserts that Kurkowski was in violation of the following work rules (WR):

- WR 1: Falsification of records, knowingly giving false information...Failing to provide truthful, accurate and complete information when required.
- WR 2: Failure to comply with written agency policies and procedures
 - Serious Misconduct 5: Gross negligence or conduct by an employee which causes a substantial risk to the safety and security of...inmates under our care.
- WR 3: ...inattentiveness, negligence...

The Department contends there is just cause for a five-day suspension because of Kurkowski's falsification of an incident report, and more importantly, that his conduct was grossly negligent by causing a substantial risk to the safety of the inmate under the agency's care when he failed to stop the inmate from inflicting self-harm. The Commission is persuaded that Kurkowski's failure to take immediate action to prevent inmate J.S. from continuing to inflict self-harm amounts to gross negligence in his duties as a correctional officer. Not only did Kurkowski walk away after J.S. threatened to kill himself, after returning 17 minutes later, aside from calling a supervisor, Kurkowski did virtually nothing for the next 20 minutes to prevent J.S. from continuing to inflict self-harm. This gross negligence, along with his unprofessional and discourteous response of "you do what you gotta do, man," constitutes serious misconduct worthy of discipline.

With respect to the falsification allegation, the record does not support a finding that Kurkowski intentionally falsified the incident report. While the description of the incident is brief in Kurkowski's incident report, it provides accurate and pertinent information about what happened that night. For future reference, Kurkowski should make his best attempt at providing a more detailed and elaborate description of incidents when filing an incident report.

We now turn to Kurkowski's defenses.

First, Kurkowski claims that he did not hear exactly what J.S. was saying to him during the conversation on January 12. Kurkowski testified that it is always very noisy on the unit, he was in the middle of picking up mail and performing other tasks, and he thought possibly that J.S. was asking him "what should I do?" That was the reason for his response of "you do what you gotta do, man." However, the Commission finds Kurkowski's testimony here as self-serving and not credible. In reviewing the body cam footage, the audio is clear. Kurkowski is approximately 12 inches away from J.S.'s cell front door, staring directly at J.S.'s face through the cell window, when J.S. asks, "do you want me to kill myself?" Additionally, the communication exchange between Kurkowski and J.S. contextually shows that Kurkowski understood what J.S. was saying. Furthermore, Kurkowski's own incident report admits J.S. "stopped and asked me something to the effect of if he should kill himself?"

Second, Kurkowski argues that he should not have been disciplined because, at the time of the incident, he was a full-time probation and parole agent for the Division of Community Corrections (DCC) but was working in his capacity as an LTE Officer for the Division of Adult Institutions (DAI). Both DCC and DAI are divisions of the Department of Corrections. While

Kurkowski may have been a part-time LTE, the fact remains that he was not serving a probationary period and was a full-time employee of the DOC with permanent status in class.² Therefore, as an employee with permanent status in class, he may be issued discipline for misconduct or violation of the State's work rules.

Finally, Kurkowski also claims that because he was only an LTE Officer at the time, he had not yet received the full correctional officer training curriculum, including the Use of Force policy and Suicide Prevention training. He has since received adequate training, and in retrospect, he acknowledges that his response to the entire incident was not appropriate. If he could go back, he should have followed up with J.S. sooner, engaged in dialogue, and clarified what message J.S. was delivering to him. While the Commission commends Kurkowski's hindsight, there are some things that are just common sense and basic human decency. It does not require training to know that when an inmate asks if he should kill himself, you don't respond with, "you do what you gotta do, man." It also does not require training to know that if an inmate is actively inflicting self-harm, at minimum, you engage in some sort of dialogue, like "please stop what you're doing," or something to that effect.

Turning to a just cause consideration of the level of discipline Kurkowski received, the record reflects that the five-day suspension was imposed as a two-level skip in the normal disciplinary progression based on the DOC conclusion that Kurkowski engaged in the falsification of records and the gross negligence or conduct which causes a substantial risk to the safety of the inmates under the agency's care. Having rejected the alleged misconduct except for that referenced in Finding of Fact 3 and 4, along with the DOC's comparable discipline examples, the Commission concludes that there is no just cause basis for a two-level skip in progression.³ However, the misconduct referenced in Finding of Fact 3 and 4 does provide just cause for a one-level skip in the standard disciplinary progression applicable to Kurkowski. Therefore, the five-day suspension shall be modified to a three-day suspension and Kurkowski shall be made whole for the difference with interest.

² See Wis. Admin. Code § ER 1.02(29) and Wis. Stat. § 230.34(1)(a)

³ In Counsel's objections to the proposed decision of the Examiner, DOC attempts to salvage the five-day suspension by arguing that Warden Stevens stated discharge could be a punishment for Kurkowski's behavior and has been for other comparables in the past. However, DOC's own exhibits and witnesses contradict this. Warden Stevens indicated that his suggested discipline for Kurkowski was a three-day suspension and this was altered by the Secretary's office, but no witness could give testimony as to why the additional skip of progressive discipline was imposed in this case. Additionally, three comparable employee conduct and disciplinary actions were introduced by DOC. In those cases, one employee, who arguably had more egregious behavior and had a prior disciplinary history, was given a ten-day suspension. The other two employees who, like Kurkowski, had no disciplinary history got a skip in progressive discipline and were given three-day suspensions. In the totality of the record presented at hearing, Kurkowski's discipline could also be modified to a three-day suspension based on disparate treatment theory in the alternative.

Issued at Madison, Wisconsin, this 21st day of November 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman