

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JANICE MUELLER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0680

Case Type: PA

DECISION NO. 40728

Appearances:

Attorney Ben Hitchcock Cross, Cross Law Firm, S.C., 845 N. 11th Street, Milwaukee, Wisconsin appearing on behalf of Janice Mueller.

Attorney David Makovec, Department of Administration, 101 E. 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 September 30, 2024, Janice Mueller (Mueller) filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Corrections (DOC).

A zoom hearing was held on December 17, 2024, by Commission Examiner Peter G. Davis. The parties made oral closing arguments at the end of the hearing. On January 15, 2025, Mueller made a motion for attorneys' fees.

On January 16, 2025, Examiner Davis issued a Proposed Decision and Order, rejecting the discharge of Mueller by the DOC, modifying the discipline to a five-day suspension, and ordering she be reinstated and made whole with interest. Mueller filed objections to the Proposed Decision on January 21, 2025. DOC filed objections to the Proposed Decision on January 24, 2025.

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

FINDINGS OF FACT

1. Janice Mueller, herein Mueller, was employed by the State of Wisconsin Department of Corrections as a Barber at the Kettle Moraine Correctional Institution. She had permanent status in class at the time of her discharge.

2. Mueller was negligent in her supervision of the barber program. Her negligent supervision led to the loss of State revenue.

3. Mueller did not fraternize with inmates or personally provide services to inmates that were outside the scope of her duties as a teacher of barbering skills.

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 discharge Janice Mueller but did have just cause to suspend her for five days.

3. Janice Mueller is a prevailing party within the meaning of Wis. Stat. § 227.485(3).

4. The position of the State of Wisconsin Department of Corrections was substantially justified within the meaning of Wis. Stat. § 227.485(2)(f).

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

ORDER

The discharge of Janice Mueller by the State of Wisconsin Department of Corrections is modified to a five-day suspension and she shall be reinstated and made whole with interest.¹

The motion for attorneys' fees is denied.

¹ See Wis. Admin. Code § ERC 94.07.

Issued at Madison, Wisconsin, this 28th day of January 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

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.

Mueller 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 Mueller 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).

The Mueller discharge letter stated in pertinent part:

This letter will serve as an official notification that you are being terminated from your position as Teacher with the Department of Corrections, Division of Adult Institution, at Kettle Moraine Correctional Institution, effective August 15, 2024. This action is being taken because you are in violation of the following Department of Corrections Work rules:

Work Rule #2: "Failure to comply with written agency policies or procedures."

DOC Serious Act: 1. Fraternization With offenders, inmates, 01· juvenile offenders including, but not limited to: sharing personal information, providing or receiving goods or services, displaying favoritism, engaging in a personal relationship. Failing to report solicitation by an offender, inmate or juvenile offender.

Work Rule #3: "Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments; directions, or instructions."

DOC Serious Act: 5. Gross negligence or conduct by an employee which causes a substantial risk to the safety and security of our facilities, staff, the community or inmates, offenders or juvenile offenders under our care.

Specifically, in April 2024, management became aware that Persons In Our Care (PIOCs) were completing paid services through the Program Barbershop, but were

having other PIOC's pay them through a Cash app rather than having disbursements processed through the Business Office. PIOC's who were in the barbershop program reported receiving the disbursements from other PIOC's, and using those to schedule services. You admitted handing disbursements you received to the PIOC tutor in order for the tutor to create the appointment schedule. You reported that disbursements were stored in a file box, and once the PIOC received a service, you would submit the disbursement to the Business Office. PIOC's reported that this allowed them the ability to easily manipulate the disbursement process, and PIOC JH reported profiting upwards of \$5,000 by going into the folder where the pending disbursements were stored, throwing them away, and having the PIOC receiving services pay through the Cash app. You denied having any knowledge that this activity was occurring. You admitted there was no process to verify that paid services were actually being paid for.

Furthermore, PIOC's in the barbershop program reported that they were able to tell you same day to call a specific PIOC to the barbershop, which you would comply. PIOC's also reported being able to come in to the barbershop for services without being scheduled or having a pass. PIOC EB reported that on 3/14/24, he was unable to be scheduled for services, but you informed him that he could stop by later that day anyway. He noted that you assisted with the services he received, and although he received a service he typically pays for, he was not asked to complete a disbursement nor did he pay for the services he received. You failed to follow KMCI Policy 900.024.01 *Barbershop and Barbering Class Operations*.

Executive Directive #16 Fraternization Policy, prohibits extending, promising, or offering any special consideration or treatment to an individual under DOC supervision. You allowed special treatment of the PIOC's both in the barbershop program and those who received services from the barbershop program by allowing them to give and receive paid services without requiring a disbursement to be processed, and permitting PIOC's access to the barbershop without passes. You also were negligent by failing to maintain control of the schedule, address unauthorized movement within the barbershop, or ensure the disbursement slips were properly secured once received.

Additionally, you introduced an Apple iWatch charger to the institution which was found in your desk in the same room as the PIOC barber stations. You admitted bringing in the charger and storing it behind your desk. You also replied that you did not request or receive permission to have this charge in the institution. This is a Violation of DAI Policy 300.00.58 *Staff Personal Property*. You previously received a 1-day suspension effective 11/30/2022, for bringing in a prohibited personal property item and storing it in your classroom without approval.

In accordance with Executive Directive #2, "The Department may impose a more severe level of discipline, up to and including discharge, for serious acts of misconduct. Employees who are found to have engaged in serious misconduct may

be terminated as an initial level of discipline depending on the seriousness of the behavior." Fraternization is considered a serious act of misconduct. Additionally, you were grossly negligent in your duties by failing to monitor the persons in your care. Your willful violation of the Department work rules has diminished the Department's trust that you are able to perform the duties of your position. Therefore, you have left me no choice other than to terminate your employment.

As part of the barbering program Mueller supervised at Kettle Moraine, inmates could request and receive certain barbering services for which the inmate was obligated to make payment to the State. It is undisputed that an inmate who was a tutor in the barbering program manipulated the payment system Mueller created so that he received payment instead of the State. Mueller did not know of the inmate's scheme but was negligent in creating and supervising a payment system that allowed the theft to occur.

Mueller was also negligent when managing the barber program in such a way that she lost control over and oversight of the process by which inmates appeared at the barbershop as volunteers.

This negligence is serious misconduct that warrants a skip in the standard disciplinary progression to a five-day suspension.

Where the Commission parts ways with the State is how to correctly view the evidence as to alleged fraternization. The record establishes that out of necessity there were always inmates coming and going from the barbershop area for barber services or to participate in the program as volunteers. While the inmate movement raised concerns from security staff and some inmates no doubt sought to arrive for non-existent appointments, there is no substantial evidence that Mueller facilitated non-essential inmate movement or sought to thwart security from doing their job managing inmate movement. More importantly, the constant presence of inmates in the barbershop was simply a function of the program's operation-not persuasive evidence of fraternization. Most specifically, the record does not support the allegation that Mueller provided any services to an inmate that should have been but were not paid for by an inmate. Mueller credibly testified that the help she provided an inmate was in the context of her role as a teacher.

In summary, the record only supports one of the two primary allegations against Mueller.² The misconduct that has been found is not sufficiently serious to establish just cause for discharge but does warrant a skip in progression to a five-day suspension. Mueller is to be reinstated and made whole with interest.³

² The discharge letter references the improper presence of a charger. No direct evidence as to the charger was presented at hearing. Had sufficient proof been established as to this alleged misconduct, it would not have impacted the level of discipline the Commission has found to be appropriate under the just cause standard.

³ Mueller argues in response to the proposed decision that Wis. Stat. § 230.34(1)(a) is being violated by DOC's agency-wide approach to discipline going through the Secretary's office instead of being the responsibility of the Warden. Mueller's argument fails, as Wis. Stat. § 230.06(1)(b) specifically states that the power and duties of the appointing authority includes the ability to discipline up to and including removal of employees. While Mueller argues that the

Motion for Attorneys' Fees

The ability to award attorneys' fees and costs in Chapter 230 discipline cases is limited by the provisions of Wis. Stat. § 227.485. A qualified prevailing party is entitled to fees and costs unless the Commission finds that "the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Here, Mueller is at least partially a "prevailing party" within the meaning of Wis. Stat. § 227.485 (3) as she has successfully overturned her discharge-albeit still receiving a stiff suspension.

When an appellant requests attorneys' fees, the State bears the burden of establishing that its position was "substantially justified." *Board of Regents v. Personnel Commission*, 254 Wis.2d 148, 175 (2002). To meet this burden, the State must show (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. *Id.* Losing a case does not raise the presumption that the agency was not substantially justified nor does advancing a novel but credible extension or interpretation of the law. *Sheely v. DHSS*, 150 Wis.2d 320, 338 (1989).

In *Behnke v. DHSS*, the Court of Appeals adopted an "arguable merit" test for determining whether a governmental action had a reasonable basis in law and fact. *Behnke v. DHSS*, 146 Wis.2d 178 (1988). It defined a position which has "arguable merit" as "one which lends itself to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy." *Id.* In *Sheely*, the Supreme Court commented on the "arguable merit" test as follows:

Although we disagree with the court of appeals' assessment of a reasonable basis in law and fact as being equivalent to "arguable merit," we do note that its definition of "arguable merit" is substantially similar to our comment here that a "novel but credible extension or interpretation of the law" is not grounds for finding a position lacks substantial justification. *Sheely v. DHSS*, 150 Wis.2d at 340.

Here, the Commission concludes the State of Wisconsin Department of Corrections was substantially justified in its position. This is obviously true as to the conduct which warranted a five-day suspension and as to which no fees would be awarded under any circumstances. While the Commission has rejected the State's interpretation of the facts surrounding alleged fraternization (and thus rejected discharge as an appropriate just cause penalty), the State did have a reasonable basis in truth for the facts alleged; a reasonable basis in law for the theory propounded; and a reasonable connection between the facts alleged and the legal theory advanced. The Commission simply did not find the State's position as to fraternization to be persuasive. Thus, the Commission denies the request for the fees that would be appropriately allocated to the rejection of the discharge. When doing so, the Commission need not and does not rule on whether the hourly rate sought by Mueller's attorney is appropriate.

Warden is the appointing authority, Wis. Stat. § 230.03(4) specifies that the "appointing authority" means the chief administrative officer of an agency, i.e. the Secretary.

Issued at Madison, Wisconsin, this 28th day of January 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman