STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHIRLEY GODIWALLA, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0690
Case Type: PA

DECISION NO. 40739

Appearances:

Attorney Colin Good, Hawks Quindel S.C., 409 East Main Street, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of Shirley Godiwalla.

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 October 30, 2024, Shirley Godiwalla (Godiwalla) filed an appeal with the Wisconsin Employment Relations Commission asserting she had been suspended for five days without just cause by the State of Wisconsin Department of Corrections (DOC).

A zoom hearing was held on January 10, 2025, by Commission Examiner Peter G. Davis. The parties filed written arguments by January 24, 2025. On January 30, 2025, Examiner Davis issued a Proposed Decision and Order modifying the five-day suspension of Godiwalla by the DOC to a one-day suspension and making her whole for the difference with interest.

On February 4, 2025, the DOC filed objections to the Proposed Decision. On February 10, 2025, Godiwalla filed a response to the objections and on February 13, 2025, filed a Petition for Attorney Fees and Costs. On February 17, 2025, Examiner Davis denied the Petition.

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

FINDINGS OF FACT

1. Shirley Godiwalla (herein Godiwalla) is employed by the State of Wisconsin Department of Corrections (DOC) as a Physician at Fox Lake Correctional Institution (FLCI), and she had permanent status in class at the time of her suspension.

2. In January 2024, Godiwalla was verbally upset with a nurse because she inaccurately believed that the nurse had failed to chart information as to a patient. The nurse reasonably felt demeaned by this unpleasant interaction and reported it to her supervisor.

3. Godiwalla told an employee that she did not trust the nurse referenced in Finding of Fact 2.

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 Shirley Godiwalla for five days but did have just cause to suspend her for three days.

3. Shirley Godiwalla is a prevailing party with the meaning of Wis. Stats. § 227.485(3).

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

ORDER

1. The five-day suspension of Shirley Godiwalla by the State of Wisconsin Department of Corrections is modified to a three-day suspension and she shall be made whole with interest.[1]

2. The Petition for Fees and Costs is denied.

[1] *See* Wis. Admin. Code § ERC 94.07.

Issued at Madison, Wisconsin, this 21st day of February 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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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.

Godiwalla 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 Godiwalla 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)

In October 2024, the Commission affirmed a three-day suspension Godiwalla received for mistreating nursing staff. This five-day suspension is imposed as progressive discipline for the same type of alleged misconduct.

The record establishes that Godiwalla has a direct communication style when dealing with nursing staff and may well be particularly direct with those nurses whose competency she questions. As reflected by the Commission's affirmation of the three-day suspension, her style can become abusive and demeaning.

In this matter, there is conflicting evidence as to some of the allegations with some witnesses supportive of Godiwalla and others not. From the testimony of the two witnesses generally supportive of Godiwalla (her supervisor and a now retired support employee), it is concluded that in the interaction summarized in Finding of Fact 2, Godiwalla did wrongly and aggressively accuse the nurse of failing to chart patient information. It is also established that Godiwalla told the support employee that she did not trust the nurse in question.

These two episodes of misconduct would typically be sufficient to support a disciplinary progression from a three-day suspension to a five-day suspension. However, the record also contains persuasive evidence that Godiwalla is making successful efforts to improve her manner of communicating. As one of the goals of discipline is to bring about change in behavior and to incentivize improvement, the Commission is persuaded that the standard progression is not consistent with just cause but that some discipline needs to be imposed for the established misconduct. Consistent with that rationale, the five-day suspension has been modified to a three-day suspension and Godiwalla shall be made whole with interest.

DOC contends that the Commission lacks the statutory authority to modify Godiwalla's discipline and is obligated to follow the DOC progression authorized by the Administrator of the Division of Personnel Management. The Commission disagrees. The Commission submits that the Administrator's authority under Wis. Stats. § 230.04(13m) is limited to establishing disciplinary standards that DOC must follow when it acts as an employer and disciplines employees. There is nothing in the text of § 230.04(13m) that even suggests that the Administrator has the authority to bind the WERC in any manner. The authority to provide binding disciplinary standards to DOC is separate and apart from the statutory authority of the Commission under Wis. Stats. § 230.44(1)(c) to determine whether discipline imposed by DOC for misconduct meets the just cause standard created by Wis. Stats. § 230.34(1)(a). One type of statutory authority gives direction to DOC when it chooses to discipline DOC employees. The other type of statutory authority establishes a standard by which the Commission determines if there was just cause for the discipline imposed if misconduct occurred. There is no conflict. The Administrator directs, DOC acts consistent with that direction, and the Commission applies a just cause standard if there is an appeal of the discipline.

The DOC position eliminates the second of the two parts of the Commission's statutory just cause jurisdiction and ignores the Commission's explicit statutory authority to "modify" discipline, instead arguing that WERC is bound by a binary choice to either affirm or reject the discipline as issued by the employer. As stated by the Wisconsin Supreme Court in *Safransky v. Personnel Bd.*, 62 Wis.2d 464, 472 (1974) "[t]he board must determine whether the discharged employee was actually guilty of the misconduct cited by the appointing authority and whether such misconduct constitutes just cause for discharge." (citing *Bell v. Personnel Board*, 259 Wis. 602 (1951) (emphasis added). The Commission acknowledges that when determining the level of discipline that is appropriate under a just cause standard, it often considers any reasonable disciplinary progression established by the Administrator and adopted by a State agency. That is so because said progressions are typically consistent with the just cause concept of having the "punishment fit the crime", allowing employees the chance to conform their behavior to the employer's expectations, but ultimately allowing employers to discharge an employee who has failed to perform satisfactorily despite being warned by receipt of lower levels of discipline. But the Commission is not legally obligated to follow the Administrator's standards adopted by DOC. Thus, when determining whether to modify discipline imposed as part of a progression, the Commission also considers other factors such the employees' work performance (*see Gliniecki v. DOC*, Dec. No. 38291 (WERC, 1/20); seniority (*see Gomez v. DOC*, Dec. No. 39760 (WERC, 2/22); lack of prior discipline (*see Nowak v. DOC*, Dec. No. 37951, WERC, 6/19); extenuating circumstances (*see Wholf v. DOC*, Dec. No. 36317 (WERC, 5/16); employer animus (*see Franke v. DOC*, Dec. No. 37807-B (WERC, 2/19); and disparate treatment (*see Waterman v. DOC*, Dec. No. 36741 (WERC, 12/16).

Thus, under the just cause standard, the Commission is not obligated to follow any disciplinary progression the Administrator has established, and DOC has adopted.

In the instant matter, the Commission is satisfied that Godiwalla's improvement in her interaction with other employees is a persuasive "extenuating circumstance" that warrants a reduction in the length of the suspension from five days to three days.

Petition for Fees and costs

The ability to award attorney 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, Godiwalla is a "prevailing party" within the meaning of Wis. Stat. § 227.485 (3) to the extent the length of her suspension has been reduced and she has requested attorney fees and costs.

When an appellant requests attorney 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.
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> *Sheely v. DHSS*, 150 Wis.2d at 340.

Here, the Commission concludes the Examiner correctly denied the request for fees. Obviously, the State met is burden of proof as to the misconduct that formed the basis for the suspension. The fact that the Commission has lessened the length of the suspension does not equate with a failure by the State to prove (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. The State has met its burden in those regards and thus was substantially justified in its position.

Issued at Madison, Wisconsin, this 21st day of February 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman