

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATTHEW J. BOYEA, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 155
No. 71722
PA(adv)-235

Decision No. 33930-A

Appearances:

Jim Parrett, Field Representative, AFSCME Council 24, N14436 17th Avenue, Necedah, Wisconsin, 54646, appearing on behalf of Matthew J. Boyea.

Paege Heckel, Labor Relations Specialist, Office of State Employment Relations, 101 East Wilson Street, Madison, Wisconsin, 53707-7855, appearing on behalf of Wisconsin Department of Corrections.

ORDER GRANTING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission on a motion to dismiss for lack of subject matter jurisdiction. The Commission received the final written argument on December 7, 2012. Solely for the purpose of ruling on the motion in a manner that conforms with the requirements of Sec. 227.47(1), Stats., the Commission has rendered the following Findings of Fact that are based upon what appear to be uncontested matters as well as a liberal construction of the information set forth in the Appellant's submissions.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Appellant Matthew Boyea is a correctional officer at the New Lisbon Correctional Institution that is operated by the Department of Corrections.

2. Prior to 2012, correctional officers were permitted to use vacation leave as a substitute for hours they were absent due to illness. DOC instituted a new "Leave Utilization Policy" to be effective beginning January 1, 2012. The new policy called for the employer to grant or deny leave substitution "based on the needs of the work unit and based on operational availability."

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3. Boyea “called in sick” on February 22, 2012 for his shift scheduled later that day. He did not have sufficient accumulated sick leave to cover the entire absence so he wished to use his available sick leave and combine it with 5.25 hours of vacation leave. The employer denied Appellant’s request to substitute vacation hours for sick leave. Because of this decision, Appellant was deemed to have taken 5.25 hours of leave without pay on February 22 without having obtained advanced approval for doing so.

4. By letter dated March 27, 2012, Respondent issued Appellant a letter of reprimand. According to the letter of discipline, the 5.25 hours of leave without pay were “unauthorized” and, therefore, an “unexcused absence” in violation of Respondent’s work rule that prohibits “[u]nexcused absence or excessive absenteeism.”

5. After unsuccessfully grieving the reprimand at the first three steps of the grievance procedure, Appellant filed an appeal with the Commission.

CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over this matter as an appeal filed under Secs. 230.44(1)(c), Stats.

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

ORDER¹

This matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of February, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

¹ Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference.

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MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

It is undisputed that at the beginning of 2012, Respondent changed its policy that had permitted correctional officers to substitute vacation leave for sick leave. The new policy provides that substitution may only occur after the employer had assessed the “needs of the work unit” and “operational availability.” When Appellant called in sick for his February 22 shift, his employer concluded that work conditions at the time did not satisfy the requirements for permitting substitution. Appellant was forced to take 5.25 hours of leave without pay. A month later, Respondent issued him a written reprimand. According to the disciplinary letter, Appellant failed to obtain approval for the leave without pay in advance, so it was “unauthorized” and violated a work rule.

Respondent made two distinct decisions. First, on February 22, Respondent applied the new policy and decided that it would deny the Appellant’s request to substitute vacation leave for several hours of absence later that day. As a consequence, Appellant had to take leave without pay. The decision underlying this result is the actual focus of the present appeal. Appellant contends, for example, that he had inadequate notice of the new policy before his February 22 request. Respondent’s second decision was to issue Appellant the written reprimand on March 27.

According to his brief, Appellant seeks “removal of the letter of reprimand and as relief has also asked to be able to use vacation in place of sick leave on his time sheet so he would suffer no loss of pay in this occurrence.” The question before the Commission is one of subject matter jurisdiction.

The Commission processed this matter as an appeal under Sec. 230.44(1)(c), Stats., of a disciplinary action. That paragraph provides for Commission review of a “demotion, layoff, suspension, discharge or reduction in base pay . . . if the appeal alleges that the decision was not based on just cause.” The Commission has consistently interpreted the absence of a written reprimand from this list to mean that we lack subject matter jurisdiction to review a reprimand. Decker v. DOC, Dec. No. 33593 (WERC, 12/2011) (“we do not have jurisdiction over a letter of reprimand which is neither in lieu of a suspension, nor with the practical effect of a suspension”).²

² As noted below, Appellant has not argued that Respondent suspended him. While the Commission may review a suspension under Sec. 230.44(1)(c), Stats., his loss of pay arose from his own request for leave, and, in contrast to the reprimand, the decision to deny his request to substitute vacation for sick leave was not a disciplinary action.

Appellant's sole jurisdictional argument is that the March 27 letter of reprimand *in conjunction* with his inability to substitute 5.25 hours of vacation time for sick leave "mak[e] this a loss penalty above and beyond a written reprimand which we believe can be grieved under 430.030, '*reduction in base pay*'." Appellant's reference is to Ch. 430 of the Wisconsin Human Resources Handbook, titled the "Employee Grievance Procedure." According to the Handbook, written reprimands "cannot be grieved beyond the second step," Sec. 430.070, but a "reduction in base pay" is subject to the procedure (Sec. 430.030) and "[g]rievances which have not been settled [by Step 3] may be appealed to the Wisconsin Employment Relations Commission under Wis. Stat. §230.44(1)(c) if the appeal alleges the decision grieved was not based on just cause" Sec. 430.080.³

"Base pay" is defined in Sec. ER 1.02(5), Wis. Adm. Code, as "the pay *rate* excluding any overtime or supplementary compensation." (Emphasis added.) Even if the Respondent's separate decisions to deny Appellant's request to substitute vacation for sick leave and to issue Appellant a written reprimand for failing to obtain advance approval for a leave without pay could somehow be considered a single disciplinary action, Respondent clearly has not reduced Appellant's rate of pay. Because it is undisputed that Respondent has not acted to impose a reduction in his "base pay," Appellant's sole jurisdictional argument fails.⁴

Appellant has not advanced an argument that the March 27 letter of reprimand coupled with his inability to substitute 5.25 hours of vacation time for sick leave was somehow equivalent to a suspension within the meaning of Sec. 230.44(1)(c), Stats. "Suspension" is not defined in either Ch. 230 or the related administrative rules. However, there is no dispute that the Appellant initiated his 5.25 hours of absence, not DOC. A voluntary absence, as here, would not qualify as a form of suspension that is subject to Commission review. Cf. Perez v. Merit Systems Protection Board, 931 F.2d 853, 855 (Fed. Cir. 1991) (holding that where an employee has "voluntarily absented" himself from work "placement in a non-pay or AWOL status" is not a constructive suspension). In addition, the absence could not be viewed as having been forced on the employee, where "forced" is one aspect of a definition of "suspension" referenced in J. v. DHSS, Case Nos. 91-0220-PC & 92-0001-PC-ER (Pers. Comm. 10/16/1992); *aff'd*, J. v. State Pers. Comm., 92-CV-4574, 93-CV-0097 (Dane Co. Cir. Ct. 1994).

³ Irrespective of the Commission's authority under Sec. 230.44(1)(c), Stats., a second provision, Sec. 230.45(1)(c), provides that the Commission shall "[s]erve as final step arbiter in the state employee grievance procedure established under s. 230.04(14)" by the director of the Office of State Employment Relations and reflected in Ch. ER 46, Wis. Adm. Code. However, cases filed under Sec. 230.45(1)(c) are subject to a \$50 filing fee as provided in Sec. 230.45(3) and Sec. PC 3.02, Wis. Adm. Code. There was no filing fee submitted with the present appeal, and in the absence of some clear assertion by Appellant of jurisdiction under Sec. 230.45(1)(c), Stats., we do not consider that provision.

⁴ Reductions in base pay are also subject to Commission review pursuant to Sec. 230.44(1)(c), Stats., but, once again, Appellant's rate of pay was unchanged rather than reduced.

Appellant has not met his burden to establish the Commission's subject matter jurisdiction over his appeal of Respondent's letter of reprimand. Accordingly, his appeal is dismissed.

Dated at Madison, Wisconsin, this 1st day of February, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner