STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREGORY L. JOHNSON, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 175
No. 71831
PA(adv)-269

Decision No. 33990-B

Appearances:

Lawrence Alan Towers, Attorney at Law, 8707 West North Avenue, Milwaukee, Wisconsin 53226, appearing on behalf of Gregory L. Johnson.

Michael Soehner, State of Wisconsin, Office of State Employment Relations, 101 East Wilson Street, Fourth Floor, Madison, Wisconsin 53703, appearing on behalf of the State of Wisconsin Department of Corrections.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 4, 2012, Appellant received a 10-day disciplinary suspension. A timely grievance was filed and on October 21, 2012, the dispute was appealed to the Commission. John R. Emery was appointed by the Commission to hear the matter. He conducted a hearing in the matter on March 26, 2013. Due to a reduction in staff, Mr. Emery was not available to complete the decision. The Commission appointed James R. Scott on August 8, 2013 to issue the Commission's decision in this matter pursuant to § 227.46(1) and (3)(a). An interim decision was issued and appellant submitted a timely request for attorney fees which was approved by respondent.

FINDINGS OF FACT

1. Appellant Gregory L. Johnson is an employee of the Wisconsin Department of Corrections holding the rank of Sergeant.

2. The Respondent Department of Corrections is a State of Wisconsin agency and operates a correctional facility identified as Milwaukee Women's Correctional Center at which Johnson was employed in April of 2012.

3. On April 5, 2012, Johnson was scheduled to begin work at 6:00 a.m.

4. Johnson resided with his wife and adult daughter. The daughter had left the home the previous evening driving Johnson's vehicle. By 5:30 a.m. she had not returned home as expected.

5. Johnson was concerned about her and contacted the Center in order to obtain his supervisor's cell phone number.

6. Johnson telephoned his supervisor, Captain Stan Neu at approximately 5:45 a.m.

7. Johnson spoke with Neu and explained the circumstances. Neu advised Johnson that he could take the day off in order to address his family issues.

8. Prior to this incident, Johnson had received progressive disciplinary suspensions and pursuant to the attendance policy any further violation would result in a ten-day disciplinary suspension.

9. The Department determined that Johnson violated the attendance policy by calling in sick less than one and one-half hour prior to his start time; and that accordingly his absence was an unexcused absence.

10. Johnson served a ten-day disciplinary suspension in June of 2012 as a result thereof.

11. Johnson did not call in seeking to utilize sick leave and did not violate the Department's work rules regarding attendance.

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to § 230.44(1)(c), Stats.

2. The Department of Corrections lacked just cause for the suspension meted out to Gregory L. Johnson and accordingly same is rejected.

3. Respondent's actions giving rise to this claim had a reasonable basis in law and fact and were therefore substantially justified.

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

Appellant's request for attorney fees is denied.

ORDER

The Department of Corrections will delete the disciplinary suspension and restore all lost wages and benefits.

Given under our hands and seal at the City of Madison, Wisconsin, this 16th day of October, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS (Gregory L. Johnson)

MEMORANDUM ACCOMPANYING INTERIM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is an attendance-related disciplinary issue involving a correction officer employed at the Milwaukee Women's Correctional Center. Like all correctional facilities, it is a 24/7 operation. Safety issues require proper manning and unplanned absences often result in overtime required in order to ensure coverage. The Department has strict attendance requirements and appropriately so.

The Commission applies a three-step analysis when reviewing an agency's decision to impose discipline: Did the employee engage in the alleged misconduct? If so, did it warrant some form of discipline? If so, was the discipline excessive? When answering the final question, the Commission must consider the nature of the misconduct; whether it impaired or tended to impair the agency's operations; the degree of any impairment, and the employee's prior work record. The agency bears the burden of proof, and must show by a preponderance of credible evidence that it satisfied all steps of the analysis. *See, Del Frate v. DOC*, Dec. No. 30795 (WERC, 2/2004).

This case comes down to a credibility determination involving Appellant Gregory L. Johnson and his supervisor, Captain Neu.[1] Johnson testified that he called in at approximately 5:30 a.m. before the start of his 6:00 a.m. shift in order to obtain Neu's cell phone number which was provided. He then called Neu and explained that his adult daughter had not returned home from an overnight departure and was using his automobile. According to Johnson, Neu told him not to worry about coming to work, and that he should take the day off and that they would address the time issue later. There was no dispute that Johnson was quite concerned about his daughter when he called Neu.

Neu's version differs from Johnson's. He acknowledges the call but denies giving Johnson permission to take the day off. Johnson's version of events has been consistent in various documents generated in the processing of this matter (Exhibits R #1, R#4, p. 3, A5) and in his testimony. The same cannot be said for the Department.

In the initial disciplinary notice Johnson received, he was disciplined in part for calling in sick after 4:30 a.m. contrary to the facility's policy requiring sick calls be made no later than one and one-half hours before the start of his shift. R. Ex. 4, p. 2. In the investigative interview in connection with the processing of the grievance, Neu indicated that a Sergeant Moyer called him and indicated that "Johnson called in sick late." Ex. A-5. Neu repeated that

[1] Consultation with Examiner Emery regarding witness demeanor was held on August 5, 2013. Emery indicated he found Appellant credible but offered no other credibility determinations regarding other witnesses. *See gen. Thomsen v. WERC*, 2000 WI App. 90 ¶ 30, 234 Wis. 2d 494, 521, 610 N.W. 2d 155.

claim in his testimony but acknowledged that Moyer may have been mistaken. The Department, to its credit, acknowledged in its post-hearing brief that Johnson did not call in sick or attempt to do so. Respondent's brief, p. 6.

Neu also indicated (as reflected in Ex. A-5) that he spoke with Warden Schaub who oversees all women's correctional facilities. According to Neu, he relayed the circumstances of Johnson's call-in to Schaub and that she indicated "that if something tragic happened to (Johnson's) daughter we would look at it in a different light." Warden Schaub testified at the hearing but was not asked about the comment.

The Department argues that we should resolve the credibility dispute against Johnson because Johnson has some prior discipline for attendance and conversely no evidence was offered that Captain Neu had any disciplinary history. We do not make credibility determinations based upon employee's disciplinary history (or absence of same) unless the disciplinary history involves a pattern of prevarication. An additional problem with the Department's position is that adopting it would encourage discovery into witnesses' prior disciplinary records. Participation in these proceedings is often uncomfortable enough without making the witness' entire work record fair game.

We recognize that consistency of explanation is a slender thread upon which to resolve this dispute. Johnson only had to remember his version of events while Captain Neu no doubt is involved in a variety of disciplinary matters involving the employees he supervises. In the end however, the inconsistency in the Department's version of events compels us to accept Johnson's version. The initial reliance and subsequent abandonment of the untimely sick leave request theory suggests that perhaps there was uncertainty about the Department's response to Johnson's request. Adding to that is Neu's decision to raise the Johnson matter with the Warden on the day it occurred together with her purported response. Strict attendance policies have the virtue of consistency at the price of removing discretion from the decision-makers. If Johnson violated the rule the punishment was automatic and should not depend on whether his daughter suffered some tragic mishap.

Given the foregoing, we accept that Johnson believed that he had been granted permission for a day off without pay and therefore reject the imposition of the discipline in this matter.

Request for Attorney Fees and Costs.

Following the issuance of the interim findings of fact, conclusions of law and order which resulted in the issuance of an order favorable to the appellant, he submitted a request for attorney fees pursuant to § 227.483(3), Stats. The amount sought was $14,665.00.

Both parties agree the standard for conferring fee awards is whether the state, as the losing party, was "substantially justified in taking its position." The state makes the additional argument that, under chapter 430 of the Wisconsin Human Resources Handbook, the WERC is barred from making any attorney fees awards under any circumstances. As the argument goes,

the handbook is part of the compensation plan adopted by the Joint Committee on Employment Relations. The joint committee in turn has the legislative delegation to adopt a compensation plan which may "supersede the provision of civil service and other applicable statutes and rules promulgated by the director." § 230.12(1)(b), Stats. Whether that delegation of power includes the authority to abrogate the Wisconsin Equal Access to Justice Act remains to be seen. The argument is not particularly well developed by the state and largely ignored by the appellant.[2] As I have concluded that the state's position was substantially justified as explained below, resolution of this issue awaits another day.

As the decision on the merits reflects, this was a very close call. The employer was clearly entitled to rely on the version of what happened as reported by the employee's supervisor. Johnson's less than stellar attendance record may well have added to the perception that the supervisor's version of events was reliable. As noted in *Cummings v. Sullivan*, 950 F.2d 492, 498 (7th Cir. 1991), "closeness of the question is itself evidence of substantial justification."

The Wisconsin Equal Access to Justice Act, § 227.485, Stats., mirrors its federal law counterpart, and we rely on both state and federal case law to guide us in applying the law. The act defines substantially justified as "having a reasonable basis in law and fact." *Id.*, § (2)(f). To meet its burden the state must demonstrate:

> (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.

Sheely v. Wisconsin Department of Health and Social Services, 150 Wis.2d, 320, 338, 442 N.W.2d (1989) (citing *Phil Smidt and Son, Inc. v. NLRB*, 810 F.2d 638, 642 (7th Cir. 1987)).

The fact that the government agency lost the case creates no presumption that the agency was not substantially justified in its actions. *Id.* The United States Supreme Court has held that the government's position is substantially justified if it is "justified in substance or in the main – that is justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550, 101 L.Ed 2d 490 (1988).

The state met its burden of establishing a reasonable basis in law and fact for the action it took and, accordingly, the request for attorney fees is denied.

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[2] The state is also encouraged, when responding to an attorney fees request, to avoid lengthy statements of fact. At this point in time, the facts have been determined and a four-page recitation of the state's view of the facts is a wasted effort.

Dated at Madison, Wisconsin, this 16th day of October, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

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