

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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DENNIS PETERSON, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 201  
No. 72039  
PA(adv)-302

DECISION NO. 34092-A

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**Appearances:**

Troy Bauch, Field Representative, Wisconsin State Employees Union, 1190 Rufledt Road, Cornell, Wisconsin, for the Appellant.

Paegge Heckel, Labor Relations Specialist – Chief, Office of State Employee Relations, 101 East Wilson Street, Madison, Wisconsin, for the Respondent.

**DECISION AND ORDER**

On March 29, 2013, Appellant Dennis Peterson filed a timely appeal with the Wisconsin Employment Relations Commission of a 1-day disciplinary suspension that Respondent Wisconsin Department of Corrections issued for a purported violation of the work rule requiring certain advance notice for the use of sick leave. The Commission designated Stuart D. Levitan, a member of its staff, as the Hearing Examiner. The parties agreed that there were no material facts in dispute, and that the matter could be handled on the documentary record and written arguments, so no hearing was held. The parties filed written arguments by August 13, 2013, and waived their right to file replies.

The parties agreed that the issue to be decided is whether there was just cause for the 1-day suspension of Dennis Peterson that the Department of Corrections imposed by letter dated October 16, 2012.

On August 28, 2013, a Provisional Proposed Decision and Order was issued concluding that there was not just cause for the suspension. Appellant did not seek fees or costs. Subsequently, the Department of Corrections objected to the proposed decision.

The Commission now hereby makes and issues the following:

### FINDINGS OF FACT

1. Respondent State of Wisconsin Department of Corrections (DOC) is the state agency responsible, among other activities, for the operation of adult prisons and correctional centers, including the Chippewa Valley Correctional Treatment Facility (CVCTF).

2. Appellant Dennis Peterson (Peterson) is a correctional officer for the DOC, assigned to the CVCTF.

3. As of February 26, 2012, DOC had a properly promulgated work rule establishing that department employees were subject to discipline for “failure to notify the proper authority of an absence or tardiness in a timely manner.”

4. As of April 28, 2004, CVCTF Procedure #900.303 provided that security staff, such as Peterson, “shall notify the on-shift security supervisor of unanticipated absences no less than 90 minutes prior to their scheduled start time.”

5. Due to a medical condition, Peterson was hospitalized from February 13-16, 2012. On March 12, he requested retroactive approval of Family and Medical Leave Act (FMLA) leave to cover the period of hospitalization and recovery, February 13-22, 2012, as well as approval for intermittent leave through the end of the year to deal with flare-ups and further treatment.<sup>1</sup>

6. On March 15, DOC approved Peterson for FMLA leave time for the period February 13-22, and through December 31, for including intermittent leave for flare ups and follow-up treatment appointments, with the following conditions:

Absences should be requested and scheduled in advance as much as possible. If you should need to take unanticipated or unscheduled FMLA leave, you must specify to the shift supervisor at the time of your call to report an absence that the absence is for a pre-approved FMLA qualifying condition. If you do not designate the absence as being under FMLA at the time you call, the absence is treated as a normal unanticipated sick leave day, and will follow Executive #2 – Employee Discipline.

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<sup>1</sup> Unless stated otherwise, all dates herein refer to 2012.

7. At 5:50 a.m. on May 31, Peterson notified the shift supervisor that he was unable to report for his assigned work shift at 6:00 a.m. that day, informing the supervisor that this was due to a pre-approved FMLA qualifying condition.

8. June 7, CVCTF Warden Pamela J. Wallace issued a written reprimand to Peterson for violating the CVCTF procedure requiring security staff to notify the on-shift security supervisor of an unanticipated absence no less than 90 minutes prior to their scheduled start time.

9. Peterson grieved the June 7 written reprimand and DOC denied the grievance.

10. On October 5, Peterson was again scheduled to begin work at 6:00 a.m. At 5:06 a.m., he called to advise the shift supervisor that he had a flare-up of his condition and was unable to report. He again advised the supervisor at the time that his unanticipated absence was for a pre-approved qualifying condition under the FMLA.

11. On October 16, CVCTF Deputy Warden Timothy Nelson issued Appellant a 1-day suspension for failing “to notify the proper authority of an absence or tardiness in a timely manner,” in violation of Work Rule 30.

12. Appellant filed a timely grievance of the suspension, which Respondent denied through the third step. Appellant on March 29, 2013 filed a timely appeal of the discipline with the Commission.

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

### **CONCLUSIONS OF LAW**

1. The Commission has the authority to review this matter pursuant to Sec. 230.44(1)(c), Stats.

2. Respondent Department of Corrections has established just cause for the suspension of Appellant Dennis Peterson.

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

**ORDER**

The Respondent's decision to suspend Appellant is affirmed.

Signed at the City of Madison, Wisconsin, this 6th day of March 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

We have rejected the examiner's proposed decision based upon our conclusion that, while the original guideline for use of FMLA leave was somewhat vague, subsequent events made Peterson's call-in obligations clear. The notice Peterson received on March 15 did not specify that Peterson had to continue to meet the institution's 90-minute advance call-in requirement. If Peterson felt there was a question about this adherence to the 90-minute rule, he should have sought guidance from the appropriate authorities at the institution. On May 31, he failed to call in 90 minutes before the start of his shift while taking an FMLA absence. He received a written warning for that failure. At that point in time, he certainly understood that he had an obligation to call in at least 90 minutes in advance of his shift start. Three months later, he violated the rule again and received the suspension which is the subject of this appeal.

The examiner reasoned that while Peterson was aware of the rule it had not been "validated" because his grievance had only been subject to review through the grievance procedure and not by this agency. We reject that reasoning and note that we are not in the business of "validating" agency work rules. It is not our expectation that work rules will be drafted with the precision expected of one drafting legal documents.

The record revealed that at the start of the following year, when the DOC issued its new notice to Peterson, they added the clarifying sentence "you must follow the call in procedure set by the institution." The examiner concluded that the addition was evidence of a change in DOC's position and supported Peterson's view that the original notice was indefinite.

In our view that post disciplinary change may well have been inadmissible under § 904.07, Stats., as a subsequent remedial measure. More importantly, the DOC should not be penalized for providing the additional clarification Peterson believed was lacking.

Finally, Peterson argues that he should be given some relief because the agency has inconsistently applied the rule. In this case, the non-lawyer representative submitted this matter based upon the paper record without hearing. Both sides advanced arguments not necessarily supported by the record. We discourage that approach. If the parties choose to submit a matter on full or partial agreed upon facts, that agreement must be reduced to writing and signed by both sides' agents. Anything less invites the kind of argument made here on behalf of Peterson which we reject as factually unsubstantiated.

Signed at the City of Madison, Wisconsin, this 6th day of March 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner