

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOHN T. WALSH, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 255
No. 72886
PA(adv)-393

DECISION NO. 35041-B

Appearances:

Michael J. Kuborn, Attorney, Curtis Law Office, 491 South Washburn Street, Suite 100, P.O. Box 2845, Oshkosh, Wisconsin, appearing on behalf of John T. Walsh.

William H. Ramsey, Deputy Legal Counsel, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin, Department of Corrections.

DECISION AND ORDER

John T. Walsh filed a timely appeal with the Wisconsin Employment Relations Commission contesting his employer, the State of Wisconsin, Department of Corrections, placing him on an unpaid leave of absence.

On March 20, 2014, a representative of the Wisconsin Office of State Employment Relations filed a motion to dismiss asserting that the Commission lacked jurisdiction to address Walsh's appeal. On June 9, 2014, the Commission denied the motion.

Hearing in the matter was held on December 10, 2014, and May 4 and 27, and June 30, 2015, before Examiner Lauri A. Millot. The parties subsequently filed written briefs, the last of which was received by December 1, 2015. To expedite disposition of this matter, the Commission has assumed direct jurisdiction over the appeal and reviewed the record.

Based on the record evidence and arguments of the parties, the Commission makes and issues the following:

FINDINGS OF FACT

1. John T. Walsh has been employed since 2010 by the State of Wisconsin, Department of Corrections as an Assistant Health Services Unit (HSU) Manager at Taycheedah Correctional Institution. Walsh had permanent status in class when the matter arose.

2. The Department of Corrections is an agency of the State of Wisconsin and operates the Taycheedah Correctional Institution.

3. DOC was concerned that Walsh may not be able to perform his job because of problems with memory, concentration, and communication abilities.

4. On July 2, 2013, DOC placed Walsh on paid administrative leave in order to obtain an independent medical examination to determine his continued fitness for duty.

5. A neuropsychologist (Dr. Paul Caillier) selected by DOC determined that Walsh suffered from attention deficit disorder and adjustment disorder not otherwise specified. He recommended a treatment plan.

6. The report was issued on October 7, 2013, and Caillier determined that Walsh presented “somewhat of a risk to safely, securely and effectively operate within a prison environment.”

7. On October 28, 2013, DOC placed Walsh on unpaid medical leave based upon its determination that Walsh’s workplace restrictions could not be honored for nursing supervisor positions.

8. Walsh was examined by Dr. Daniel Neunaber, a psychologist he retained, in December of 2013. Neunaber opined that Walsh had no attention deficit disorder and no history of same.

9. On April 9, 2014, at DOC’s direction, Walsh was re-examined by Caillier who determined that he had “considerably improved” and now had focused attention problem - mild.

10. On May 15, 2014, Walsh was directed to return to work and did so on May 27, 2014.

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 matter pursuant to §§ 230.34(1)(a); 230.44(c); and 230.45(a), Stats.

2. The State of Wisconsin Department of Corrections failed to meet the requirements of § 230.37(2), Stats., when it placed John T. Walsh on unpaid medical leave for seven months.

3. The State of Wisconsin Department of Corrections failed to establish just cause for the § 230.37(2), Stats., forced unpaid medical leave of John T. Walsh.

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

ORDER

The State of Wisconsin Department of Corrections will compensate John T. Walsh for lost wages and benefits incurred from October 28, 2013, through May 19, 2014, less any interim earnings.

Signed at the City of Madison, Wisconsin, this 16th day of November 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

When Walsh began to demonstrate erratic behavior in the workplace, DOC surmised that perhaps a physical or mental condition was causal. Employers with such concerns are often in a difficult situation balancing a variety of legal obligations. Disability discrimination issues and particularly those involving the duty to accommodate come into play. State and federal Family and Medical Leave Act concerns may be involved as well. State agency employers face the additional obligations set forth in § 230.37(2), Stats. Essentially what the statute requires is that the state employer explore all possible alternatives to removing the employee from the workforce before doing so. *Anderson v. Dept. of Safety and Professional Services*, Dec. No. 34656-A (Scott with final authority, 03/2014).

Here, DOC placed Walsh on a paid administrative leave for the purpose of determining his fitness for duty. He was examined by a Ph.D. psychologist and upon submission of his report Walsh was placed on indefinite leave without pay status. The letter advising Walsh of his change in status stated that psychologist Caillier determined that Walsh was “unfit for duty as a nursing supervisor.” To the contrary, Caillier’s report does not expressly conclude that Walsh was unfit to perform his duties as a nursing supervisor. Caillier does indicate that Walsh was capable of working full time “depending on the type of work.” He characterized Walsh as presenting “somewhat of a risk to safely, securely and effectively” working in a prison environment. He describes a treatment plan of medication and counseling which in his judgment would remedy the problems. Caillier concludes that “given appropriate remediation [Walsh] can safely and effectively perform the job of a nursing supervisor.”

Given those conclusions, we would assume that DOC would make certain that Walsh was placed on the drug and counseling program of remediation which would result in his being able in short order, if not immediately, to return to work. At the very least, DOC should have explored placing Walsh in another position within the agency. The statute clearly mandates that effort.

Yet in spite of the inconclusive nature of Caillier’s report and the statutory obligation, DOC simply placed Walsh on leave without pay status. No effort was made to provide assistance or direction to Walsh, and he was directed not to access the workplace or any resources without specific prior approval from the human resources director or his supervisor.¹

When queried about DOC’s obligation under the statute, the division administrator responded that “historically we don’t make work for someone to come back when they are not fit to do the job that they were hired to do.” While DOC is not necessarily “required” to create a position, they are statutorily obligated to examine alternative options prior to removing the employee from the workplace. The record in this matter indicates that no such effort was made

¹ Walsh was not provided with a copy of the Caillier report at the time of being placed on leave, and he therefore had no opportunity to “remediate” his condition.

by DOC. We are left with the impression that once Walsh was removed from the workplace there was no concern about his future employment with the agency.

Walsh took the initiative to obtain an examination by another psychologist who concluded that he had no psychological disorder and no need for ongoing treatment. DOC then sent Walsh back to Caillier for a second examination at which he concluded that Walsh had improved and was diagnosed as having a “focused attention problem – mild.” This condition would not prevent Walsh from returning to work and performing his job. He was released to return to work on May 19, 2014. The consequence of DOC’s failure to perform its statutory obligation was that Walsh went from October 28, 2013, until May 19, 2014, without compensation.²

DOC failed to meet its statutory obligations and we have no alternative but to conclude that there was no just cause for the suspension.

Signed at the City of Madison, Wisconsin, this 16th day of November 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

² The record does not reflect whether Walsh had accumulated sick leave to cover some or all of his loss of wages. If such leave was used, his account should be restored.