

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVID E. GALLOPS, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0087

Case Type: PA

DECISION NO. 36104-A

Appearances:

David E. Gallops, 758 Prairie Place, Green Lake, Wisconsin, appeared on his own behalf.

Michael Gentry, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appeared on behalf of the State of Wisconsin, Department of Corrections.

DECISION AND ORDER

On August 14, 2015, David E. Gallops filed an appeal with the Wisconsin Employment Relations Commission pursuant to § 230.44(1)(c), Stats., asserting that the State of Wisconsin, Department of Corrections placed him on an unpaid leave without just cause. The Commission assigned the appeal to Hearing Examiner Karl R. Hanson who conducted a hearing on January 14, 2016, in Fox Lake, Wisconsin. The hearing was audio recorded and no transcript was produced. The parties filed written arguments, the last of which was received on February 19, 2016.

On March 24, 2016, Examiner Hanson issued a proposed decision concluding the State did not have just cause to suspend Gallops. The State filed objections to the decision and the matter was ripe for Commission action on May 6, 2016.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. The Department of Corrections (“DOC”) is an agency of the State of Wisconsin and operates the Fox Lake Correctional Institution (“FLCI”) in Fox Lake, Wisconsin.

2. David E. Gallops is employed as an electrician by DOC at FLCI and had permanent status in class at all times relevant to this appeal.

3. Effective April 1, 2014, Gallops required a journeyman or master electrician’s license from the Department of Safety and Professional Services (“DSPS”) in order to perform the full scope of his position’s duties at FLCI; Gallops was capable of performing the vast majority of his duties at FLCI without a DSPS master electrician’s license.

4. DOC placed Gallops on what it called an unpaid leave from April 24, 2015 until June 11, 2015, after he obtained a DSPS master electrician’s license.

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

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction to review this matter pursuant to § 230.44(1)(c), Stats.

2. Between April 24, 2015 and June 11, 2015, the State of Wisconsin, Department of Corrections suspended David E. Gallops from his employment as an electrician at the Fox Lake Correctional Institution.

3. The State of Wisconsin, Department of Corrections did not have just cause within the meaning of § 230.34(1)(a), Stats., to suspend David E. Gallops.

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

ORDER

The suspension in this matter is rejected, and the State of Wisconsin, Department of Corrections is directed to remove the suspension letter in question from David E. Gallops’ personnel record and to make him whole for all lost wages and benefits, including restoration of any leave used by Gallops while he was suspended.

Signed at the City of Madison, Wisconsin, this 23rd day of May 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., provides in pertinent part the following as to certain employees of the State of Wisconsin:

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.

Gallops had permanent status in class at the time DOC placed him on what it termed as an unpaid leave from April 24, 2015 until June 11, 2015. There is no allegation that Gallops committed any misconduct or that DOC's action was disciplinary in nature.

Gallops must prove that the Commission has jurisdiction over this appeal. *Renfrow v. DOC*, Dec. No. 33984-A (WERC, 04/2013). If Gallops is successful in meeting his threshold burden, then DOC must establish, by a preponderance of the evidence, that it had just cause for its decision to place Gallops on what it called an unpaid leave. To establish just cause, DOC must prove that it had no reasonable alternative to the action it took against Gallops. *Gallops v. DOC*, Dec. No. 36104, (WERC, 11/2015).

I. DOES THE COMMISSION HAVE JURISDICTION?

Gallops argues that DOC's action against him on April 24, 2015, was either a layoff or a suspension. DOC argues that its action of placing Gallops on what it called an unpaid leave was the exercise of a management right that does not give rise to jurisdiction of the Commission over this matter. The label DOC attaches to its action against Gallops is not dispositive of the Commission's jurisdiction. *Shallock v. DOC*, Dec. No. 35432 (WERC, 10/2014).

DOC did not layoff (as the term is defined by the Administrative Code) Gallops from his employment with DOC. When an employee is placed in an unpaid status by force (as opposed to voluntarily), the employer has suspended the employee. *Boyea v. DOC*, Dec. No. 33930-A (WERC, 02/2013). Unlike the employee in *Boyea*, Gallops did not seek to absent himself from work voluntarily in any sense.

DOC took action to temporarily deprive Gallops of his position as an electrician. Regardless of what DOC calls such action, from April 24, 2015 through June 11, 2015,

Gallops was suspended from his employment with DOC. Gallops alleges that DOC did not have just cause to suspend him. The Commission has jurisdiction over this appeal.

II. DID DOC HAVE JUST CAUSE TO SUSPEND GALLOPS?

Gallops began his employment as an electrician with the State of Wisconsin in 1998. Since 2002 he has been employed by DOC as an electrician at FLCI. At the time he was hired and until April 24, 2015, Gallops was not required by DOC to possess any state issued license as an electrician.

Effective on April 1, 2014, Wisconsin required electricians to obtain a license from DSPS. The statute mandating this change provided a series of exceptions to the requirement for possession of a license.

The circumstances leading up to the April 24, 2015 suspension are aptly described as a comedy of errors.¹ Nonetheless, those events are largely irrelevant to whether DOC had no reasonable alternative other than to suspend Gallops from his position between April 24, 2015 and June 11, 2015.

After determining in early-April 2015 that Gallops required a license, DOC considered three courses of action. First, FLCI attempted to coordinate for another institution's master electrician to supervise Gallops' electrical installation work. FLCI's employees correctly believed that Gallops could perform the remainder of his duties without a license.

Second, by April 24, 2015, DOC's human resources officials at its central office decided that Gallops should be fired that day because he did not meet what they determined was a qualification required for his position as an electrician. To his credit, FLCI Warden Randall Hepp went outside of DOC's human resources channels and obtained permission from his superior to not fire Gallops.

Third, and finally, DOC determined that it would treat Gallops like a teacher whose qualifications lapsed.² On April 24, 2015, Gallops was placed on administrative leave without pay until he obtained a journeyman or master electrician's license.

¹ Gallops did not need any license as an electrician in Wisconsin prior to April 1, 2014. Gallops, a layman to the law, incorrectly believed an exception to the law applied to him for all of his job duties. DOC had definitive information in 2012 from DSPS that Gallops required a license, but did not tell Gallops. In 2014, DOC received information from the Office of State Employment Relations ("OSER") regarding the application of licensing requirements to electrician positions. DOC sent this information to all of its institutions, except FLCI – the only institution which employed an electrician who did not possess a DSPS license. On April 6, 2015, Gallops and his supervisors learned from a state inspector that he *should* obtain a license (the inspector never opined regarding whether Gallops *must* obtain one). Gallops applied for the wrong license and missed the first exam date for the correct license (it is unknown whether seats for that first exam were full by that point). Gallops failed the first exam he took twelve days after being suspended by four percentage points. The next available exam date was June 3, 2015; Gallops took the exam that day and passed. Virtually every witness who testified was confused to some degree about how the new law's requirements and exceptions applied to Gallops.

² DOC has a published policy describing this consequence for uncredentialed teachers, but does not have a similar policy for other professionals or skilled employees who require licenses.

DOC argues that it had no alternative but to suspend Gallops until he obtained a license. It argued without citation to controlling authority that it is unlawful for DOC to employ an individual who does not meet all of the requirements of an OSER class specification.

Notwithstanding the conclusory testimony of DOC's witnesses, the April 6, 2014 revised OSER class specification for an electrician does not by its plain reading require every electrician to maintain a journeyman or master electrician's license. Instead, the class specification states, "[t]o perform electrical work *other than what is identified in s. 101.862(4), Wis. Stats.*, [which is the subsection of statute providing exceptions to licensing requirements] a person will need to be licensed by the State of Wisconsin as a Master Electrician or be licensed by the State of Wisconsin as a Journeyman Electrician". Ex. R119 (emphasis added). The class specification explicitly permits an unlicensed electrician to perform any work listed in the exceptions of the 2014 law, contrary to the opinions of DOC's witnesses.

After OSER announced the changes to the electrician class specification, it provided a summary of "Electrician Licensing Requirement Changes" in which it stated, "only licensed electricians may install electrical wiring and equipment Employees are not required to have a license to maintain or repair existing electrical wiring or equipment." Ex. R117.

The law effective on April 1, 2014 provides that no person may install, repair, or maintain electrical wiring unless licensed by DSPS. Among a lengthy list of exceptions to the new law, an unlicensed individual may work as an electrician to maintain and repair electrical wiring within an existing facility owned by his employer. § 101.862(4)(b), Stats. Additionally, the exceptions provide that an unlicensed individual may work as an electrician to also install electrical wiring within an existing industrial or manufacturing facility owned by his employer. § 101.862(4)(am), Stats.

As of April 24, 2015, FLCI identified ten electrical installation tasks that Gallops could not perform without a license. None was considered urgent. One had been awaiting action for about a year with the same level of priority. Only two projects had deadlines, one of which, according to Gallops' supervisor, may not have been an installation project after all (Gallops may have been able to complete it without a license). Gallops could perform at least 80 percent of his position description's goals and activities without a DSPS license.³ See Ex. R103.

³ Based upon the exceptions to the new law, Gallops could perform all maintenance and repair tasks throughout FLCI, and he could perform all installation, maintenance, and repair tasks in FLCI's Badger State Industries industrial/manufacturing facility. "In the absence of evidence to the contrary, it is assumed that each activity within a goal is performed the same percentage of time." *Peterson v. DOA*, Dec. No. 32814-A (WERC, 09/2009). Gallops could fully perform his position description goals A2, A3, A4, A5, A7, B, C, D, E, and F, amounting to no less than 78.6 percent of his time. He could also perform significant, but unquantifiable, parts of goals A1 and A6.

Unlike a teacher who, by application of a DOC policy, cannot work without current teaching credentials, Gallops could perform the majority of his work functions without a DSPS license. An alternative to suspension was available to DOC and it was more reasonable.

DOC could have required Gallops to obtain a DSPS license and given him a reasonable amount of time to do it. In the interim, Gallops could still perform at least 80 percent of his theoretical duties, and he seemingly could perform all of his current actual tasks except for one or two installation projects. If completion of those one or two projects could not be deferred until Gallops obtained his license, DOC could have brought in one of its electricians from another facility to complete the one or two projects or brought in a contractor to do so (if the project was a priority, this would be necessary whether or not Gallops was suspended). DOC presented no evidence that such alternative arrangements were unfeasible or cost prohibitive.

DOC has not met its burden to prove that no reasonable alternative to the suspension existed.⁴ The suspension is rejected and Gallops must be made whole. DOC permitted Gallops to use paid vacation while he served his suspension in lieu of being unpaid. As part of making Gallops whole for his lost wages and benefits, DOC must restore to Gallops the full amount of leave he used between April 24, 2015 and June 11, 2015.⁵

Signed at the City of Madison, Wisconsin, this 23rd day of May 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

⁴ DOC's argument that its suspension of Gallops was voluntary is irrelevant to the question of whether DOC had no reasonable alternative other than to suspend Gallops.

⁵ If DOC requires its other electricians or similarly situated skilled workers to use vacation to take licensing examinations, then it is reasonable that Gallops be charged vacation time for the time he spent traveling to and from the exam and taking it.