

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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ROBERT D. SCHALLOCK, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0117

Case Type: PA

DECISION NO. 36326

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**Appearances:**

Nicholas E. Fairweather, Hawks Quindel, S.C., 222 W. Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of Robert D. Schallock.

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

**DECISION AND ORDER DENYING MOTION TO DISMISS**

On October 23, 2015, Robert D. Schallock received a written reprimand in lieu of a suspension for a September 9, 2015 work rule violation. He filed a timely grievance and seeks review by the Wisconsin Employment Relations Commission. The Department of Corrections moves to dismiss asserting we lack jurisdiction over this matter.

The state's position is that Schallock is an exempt employee under the provisions of the Fair Labor Standards Act (FLSA) and that DOC is therefore prevented from suspending Schallock for less than one week. The DOC relies on the Wisconsin Human Resources Handbook, ch. 520, § 520.060(4)(f)(2), as authority. The Handbook does include such an instruction and purports to base its view upon the FLSA and its accompanying regulations.

The state posits that a written reprimand in lieu of a suspension is in effect a "suspension with pay" over which we have no jurisdiction. The argument of course overlooks the fact that the Commission (and its predecessor agency, the Personnel Commission) has held, since 1998, that written reprimands in lieu of suspensions do fall within our jurisdiction.

*DOC v. Rodgers*, Dec. No. 98-0094-PC (Pers. Comm. 1999); *Jackson-Ward v. Dept. of Revenue*, Dec. No. 32471 (WERC, 2009).

The state argues in conjunction with its theory that § 230.34(1)(a), Stats., creates a protected property interest in continued employment and that the provision only requires “just cause” for “suspensions without pay.” As the argument goes, “suspensions with pay” may be imposed without just cause. Of course this all assumes that the state’s creative characterization of “written reprimand in lieu of suspension” as a “suspension with pay” is accurate.

Lest we be too critical of the argument, we must note that the original Personnel Commission decision itself is a bit illogical. The Personnel Commission reasoned that while a “written reprimand in lieu of suspension” does not include being relieved of one’s duties or any loss of pay, it does blemish an employee’s disciplinary record and this record may move an employee “up the ladder in terms of future disciplinary action.” The problem with this rationale is that it could be applied to a written reprimand itself over which we clearly do not have jurisdiction.

To further compound the jurisdictional dilemma, we note that the Handbook provision interpretation of the FLSA requirements is simply wrong. In 2004, the FLSA regulations were subject to a regulatory overhaul. Prior to that time, the Department of Labor took the position that if an employer gave an otherwise exempt employee a disciplinary suspension of less than a full week, the employer would forfeit the exemption and the employee would be entitled to statutory overtime payments. There was some dispute as to whether that forfeiture was applicable only to the pay period in which the suspension occurred or a permanent loss of exempt status. In any event, the 2004 modification of the regulations included the adoption of the following provision at 29 C.F.R. § 541.602(5):

Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

The language clearly authorizes disciplinary suspension of exempt employees and has done so since 2004.<sup>1</sup> The consequence is that save for rare circumstances there should no

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<sup>1</sup> The Handbook provision also makes reference to state labor standards law. The applicable state overtime regulations do not apply to employees of the State of Wisconsin. Wis. Admin. Code § DWD 270.08(2).

longer be any written reprimands in lieu of suspensions for state employees. It is foreseeable that a situation could occur where an employee should receive a suspension but the employee has skills which are irreplaceable over a short time. There may be other unique situations but as a general rule the “in lieu” of cases should no longer occur.

Prospectively, we will no longer exercise jurisdiction over “written reprimands in lieu of suspensions.” We will not consider them as an appropriate step in a progressive disciplinary system unless it is an unusual circumstance that gives rise for the need to impose such a penalty. In other words, a written reprimand in lieu of suspension will be treated as a written reprimand.

That brings us to Schallock. The DOC in good faith relied on the Handbook. We will remand this matter to the DOC and give it the option of treating the discipline as a written reprimand in which case the appeal will be dismissed or they may impose a one-day disciplinary suspension which we will assume jurisdiction over and assign the matter for hearing.

### **ORDER**

1. The motion to dismiss is denied.
2. The appeal of Robert D. Schallock is remanded to the State of Wisconsin, Department of Corrections for review consistent with this above opinion.

Signed at the City of Madison, Wisconsin, this 11th day of April 2016.

### **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner