

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PAUL TAYLOR, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0139

Case Type: PA

DECISION NO. 36363-A

Appearances:

William Rettko, Attorney, Rettko Law Offices, S.C., 15460 West Capitol Drive, Suite 150, Brookfield, Wisconsin, appearing on behalf of Paul Taylor.

Cara Larson, Attorney, Department of Administration, 101 East Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On April 4, 2016, Paul Taylor filed a timely appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting he had been discharged without just cause by the State of Wisconsin Department of Corrections. On June 22, 2016, the Commission denied a motion to dismiss the appeal and remanded the matter for further processing under the State grievance procedure. The appeal remained unresolved and was ultimately assigned to Hearing Examiner Danielle L. Carne. Hearing was held on December 14 and 15, 2016, in Glendale, Wisconsin. Subsequently, the parties submitted written argument and the record was closed on February 10, 2017.

On April 14, Examiner Carne issued a proposed decision modifying the discharge to a three-day suspension. The State filed objections to the proposed decision, Taylor filed a request for attorney fees and costs and the matter became ripe for Commission consideration on May 31, 2017.

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 that operates prisons and correctional facilities. One such facility is the Milwaukee Secure Detention Facility (MSDF).

2. At the time of his discharge on March 4, 2016, Paul Taylor was employed by DOC at MSDF as a correctional officer and had permanent status in class. He performed maintenance work.

3. Taylor's late arrival at work on January 13, 2016 was excused by his supervisor.

4. In February of 2016, Taylor left a screwdriver on a desk in an office where he had been working. Subsequently, he did not conduct required inventories which would have revealed that the screwdriver was missing.

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 to review this matter pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Corrections had just cause within the meaning of § 230.34(1)(a), Stats., to discharge Paul Taylor.

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

ORDER

The discharge of Paul Taylor is affirmed.

Signed at the City of Madison, Wisconsin, this 28th day of June, 2017.

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.

Paul Taylor had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that Taylor was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

DOC discharged Taylor for two reasons. First, DOC concluded that Taylor violated policy by arriving late to work three times in a 12-month period. Second, DOC concluded that Taylor misplaced a screwdriver out of his maintenance toolbox and subsequently failed to inventory his tools as required.

Tardiness

On January 28, 2016, Taylor was on his way to work when he encountered an accident and slow traffic on the highway. He called MSDF and reported that he might be late for the 7:30 a.m. start of his shift. Taylor's discharge letter indicates that he arrived at MSDF that morning at 7:31 a.m. The letter also states that Taylor's late arrival of January 28 warranted discipline because it followed two other late arrivals on the mornings of January 13 and January 26.

Taylor was not disciplined for the late arrivals on January 13 and January 28. But for these two late arrivals, Taylor would not have been disciplined for the January 28 late arrival. Because we are satisfied that Taylor's late arrival on January 13 was excused by his supervisor, that late arrival cannot be used as a predicate for disciplining Taylor following his late arrival on January 28.

The record shows that prior to the beginning of his January 13 shift Taylor called supervising officer Lieutenant Brandon Morris. Taylor told Morris that he had two flat tires on his car and asked Morris if he could get them repaired before coming to work. It is undisputed that Morris gave Taylor permission to take leave time to deal with the flat tires. It also is undisputed that Morris later confirmed, when questioned by MSDF management, that he had

given such permission. Morris testified at hearing in this matter that he did not think Taylor's late arrival was a "big deal," because it did not have any impact on the operation of that particular shift.

Given the foregoing, Taylor's conduct on January 28 cannot be used as a basis for his discharge and the question of just cause turns on his conduct vis-à-vis the screwdriver.

The Screwdriver

The record persuades us that Taylor misplaced the screwdriver on a Friday, did not work over the weekend, and then worked on Monday and Tuesday. Tuesday was the day the missing screwdriver was brought to his attention. Thus, Taylor not only misplaced the screwdriver but failed to conduct the tool inventories that could have led him to realize the screwdriver was missing.

When reaching our conclusion, we have considered Taylor's contention that DOC cannot prove it was his screwdriver due to irregularities regarding toolbox assignments and tool markings. However, there is sufficient evidence to establish that Taylor misplaced the screwdriver. On the day the tool was found, Taylor had been working with two inmates in the office of Debra Kimaiga, a unit supervisor. Their task was to hang pictures and touch up paint. Kimaiga credibly testified that Taylor and the inmates used a screwdriver in completing the work and that she found the same screwdriver later that day on the desk behind her computer. During any intervening time in which she was away, her office door was locked. The general sensitivity in a prison facility toward unsecured tools makes it very unlikely that the tool could have been sitting, as Taylor's suggests, unnoticed on Kimaiga's desk for some time before Taylor worked in her office.

It is undisputed that Taylor failed to subsequently inventory his toolbox which would have revealed the screwdriver was missing.

As to whether this misconduct establishes just cause for Taylor's March 4, 2016 discharge, the record reflects that on March 30, 2015, Taylor was suspended for five days. He filed an appeal and we affirmed the suspension (see *Taylor v DOC*, Dec. No. 36157 (WERC, 03/16). The record further reflects that, in October 2015, Taylor was suspended for ten days and no appeal was filed. The evidence suggests that, if Taylor had had a clean disciplinary record in February 2016, he might well have received a written reprimand for his misconduct. However, given his disciplinary history, at the time of his misconduct in February, 2016, the next step for Taylor in the DOC standard disciplinary progression was discharge.¹ In light of his standing in the disciplinary progression and our general reluctance to second guess the DOC's decision to follow that progression, we conclude there was just cause for discharge.

¹ In reaching this conclusion, we have considered and rejected Taylor's argument that, at least for the purposes of assessing the appropriate disciplinary penalty for his misconduct, Taylor should only be understood to have only received a three-day suspension within the twelve months preceding his discharge. Taylor's argument is premised on the impact on the retroactive reduction of a three-day suspension to a written reprimand with an April, 2013, effective date. Whatever the merits of this argument might have been if timely raised by Taylor in the context of a June, 2014, three-day suspension which was not appealed, it is clearly untimely now in the context of the subsequent five-day suspension we affirmed and the subsequent ten-day suspension that was not appealed.

Signed at the City of Madison, Wisconsin, this 28th day of June, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner