

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRANK A. WESSELY, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION, Respondent.

Case ID: 446.0007

Case Type: PA

DECISION NO. 36940

Appearances:

Frank A. Wessely, E3141 Ryan Radio Road, Kewaunee, Wisconsin, appearing on his own behalf.

Cara J. Larson, Attorney, Wisconsin 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 Transportation.

DECISION AND ORDER

On March 15, 2017, Frank A. Wessely filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting he had been suspended for three days without just cause by the State of Wisconsin Department of Transportation. The appeal was assigned to Peter G. Davis for the purpose of conducting a hearing and issuing a proposed decision and order.

Hearing was held on April 27, 2017, in Madison, Wisconsin, and the parties made oral argument at the conclusion of the hearing.

On May 15, 2017, Examiner Davis issued a proposed decision affirming the suspension. On May 8, 2017, Wessely filed objections to the proposed decision. The Wisconsin Department of Transportation did not file a response and the matter became ripe for Commission consideration on May 16, 2017.

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

FINDINGS OF FACT

1. Frank A. Wessely has been employed as programmer by the State of Wisconsin Department of Transportation since 1998. He has permanent status in class.

2. In October 2016, Wessely received a one-day suspension for taking unauthorized photographs of coworkers.

3. On November 9, 2016, the day after the 2016 presidential election, Wessely wore a “Hillary for Prison” t-shirt during his workday. As part of the standard disciplinary progression, he received a three-day suspension for doing so.

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 Transportation had just cause within the meaning of § 230.34(1)(a), Stats., to suspend Frank A. Wessely for three days.

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

ORDER

The three-day suspension of Frank A. Wessely by the State of Wisconsin Department of Transportation is affirmed.

Signed at the City of Madison, Wisconsin, this 7th 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.

Frank A. Wessely had permanent status in class at the time of his suspension and his appeal alleges that the suspension was not based on just cause.

The State has the burden of proof to establish that Wessely 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).

The State prohibits employees from wearing political items in the workplace.¹ Prior to the 2016 presidential election, the Department of Transportation's Human Resources Department (DOT) sent an email to all DOT employees which contained that prohibition.

It is undisputed that the day after the 2016 presidential election Wessely wore a t-shirt to work with the words "Hillary for Prison" and an American flag on the shirt front. As he correctly believed the t-shirt would offend some coworkers, Wessely wore a sport coat over the t-shirt which partially hid its content. As the workday progressed, Wessely would unbutton the sport coat from time-to-time to show the t-shirt to coworkers who he believed would find it entertaining. During that workday, no supervisor saw Wessely.

Once DOT became aware that Wessely wore the t-shirt (as a result of an inquiry from a coworker who saw the shirt), it subsequently suspended Wessely for three days.

By wearing the t-shirt, Wessely engaged in prohibited conduct.² In light of the one-day suspension already on his record, DOT imposed a three-day suspension as part of its standard

¹ Wessely argues that because he wore the t-shirt the day after the election, it was no longer "political." While he may be correct that at some point in time certain "political" items become memorabilia (like the Doyle bumpers stickers he testified he had displayed in his office cubicle), that clearly is not the case the day after a hotly contested election.

² Wessely contends that DOT failed to establish that wearing the t-shirt caused disruption in the workplace and thus was not prohibited. While he is no doubt correct that there was no measurable lessening of work performance that day, it is clear that the t-shirt caused at least one group of coworkers to gather and discuss the t-shirt during work hours. More importantly, the State has decided that wearing political items in the workplace is per se prohibited because there is always the potential that disruption "could" be caused. We do not find a persuasive basis for concluding that the State's view is overbroad.

disciplinary progression. Wessely argues that a more appropriate disciplinary response would have been a warning and request that he not wear the t-shirt again. In this regard, he credibly testified that he would have immediately complied with any such request received on the day in question. We suspect that DOT might well have proceeded in this fashion had a supervisor observed the t-shirt on November 9. However, such an observation did not occur and we do not second guess DOT's use of more formal discipline as part of its standard progression. Therefore, we have affirmed the discipline.

Signed at the City of Madison, Wisconsin, this 7th day of June, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner