

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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KYLE J. HOFF, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0211

Case Type: PA

DECISION NO. 36979-A

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**Appearances:**

Kyle J. Hoff, 1109 Charlene Avenue, Tomahawk, Wisconsin, appearing on his own behalf.

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

**DECISION AND ORDER**

On June 20, 2017, Kyle J. Hoff filed an appeal with the Wisconsin Employment Relations Commission, asserting that the State of Wisconsin Department of Corrections rescinded his prior discretionary merit compensation award and thereafter took money from him without just cause. On August 10, 2017, the Commission denied the State's motion to dismiss the appeal. The Commission assigned the appeal to Hearing Examiner Karl R. Hanson who conducted a hearing on August 21, 2017, in Madison, Wisconsin.

On September 1, 2017, Examiner Hanson issued a Proposed Decision and Order concluding the State lacked just cause to rescind the award. The State filed objections, the Appellant filed a response, and the matter became ripe for Commission action on September 14, 2017

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

**FINDINGS OF FACT**

1. Kyle J. Hoff is employed by the State of Wisconsin Department of Corrections and had permanent status in class at the time a \$2,500 discretionary merit award previously paid to him was rescinded.

2. After rescinding the discretionary merit award, the Department of Corrections began recouping \$2,500 from Hoff by deducting approximately \$178 per pay period from his wages.

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 appeal pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Corrections did not have just cause within the meaning of § 230.34(1)(c), Stats., to take \$2,500 from Hoff's pay.

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' action to take \$178 per pay period from Kyle J. Hoff until it collects \$2,500 from him is rejected. The State of Wisconsin Department of Corrections shall cease deducting such money from Hoff's wages and refund to him any such money taken from his paychecks.

Signed at the City of Madison, Wisconsin, this 29th day of September 2017.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

Kyle J. Hoff is employed at the Department of Corrections' Lincoln Hills School and Copper Lake School facility (collectively referred to herein as "Lincoln Hills"). On November 2, 2016, the Department of Corrections ("DOC") issued Hoff a letter of reprimand.<sup>1</sup> Hoff was reprimanded by DOC for three incidents of alleged misconduct that occurred in June and November, 2015.

Nonetheless, on April 19, 2017, DOC granted Hoff a discretionary merit compensation ("DMC") award of \$2,500. The award was recommended by Hoff's supervisor, the Lincoln Hills superintendent, and the administrator of DOC's Division of Juvenile Corrections. All three found that Hoff met the eligibility requirements for the award. DOC's central human resources staff, overseen by Kari Beier, processed the award paperwork and added Hoff's name to the list of about 1,460 DOC employees to be granted awards. The Department of Administration's Division of Personnel Management approved the list. The award was paid to Hoff on May 25, 2017.

Subsequently, a reporter from the *Milwaukee Journal Sentinel* contacted DOC and inquired about DMC awards granted to four employees at Lincoln Hills, including Hoff. As a result of the inquiry, DOC Secretary Jon Litscher ordered the DOC's human resources staff to review the 42 DMC awards granted to Lincoln Hills employees.

On June 12, 2017, Beier, the director of DOC's Bureau of Personnel and Human Resources, notified Hoff that "[a]fter further review, it was determined this [DMC] award was granted in error and the award must be rescinded." Beier informed Hoff that his net pay would be reduced by approximately \$115 per pay check. DOC has since deducted approximately \$178 per pay period from Hoff's wages.<sup>2</sup>

I. JURISDICTION

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.

Hoff had permanent status in class at the time DOC began deducting \$178 per pay period from his wages. He alleges DOC's action was disciplinary and not based on just cause.

At hearing, DOC renewed its argument that the Commission lacks jurisdiction over decisions to grant or deny a DMC award. As the Commission stated in its prior decision denying DOC's motion to dismiss this matter, if Hoff proves that DOC's action to take money from him

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<sup>1</sup> This letter amended a prior July 6, 2016, letter of discipline.

<sup>2</sup> DOC argues that a deduction of \$178 from Hoff's gross wages results in a net difference of \$115 on Hoff's paycheck, presumably due to the impact on withholdings. No evidence, however, was presented to fully explain the difference. Therefore, this decision addresses the amount of money proven to be deducted from Hoff's gross pay.

was disciplinary in nature, then the Commission has jurisdiction and DOC must establish just cause for its action. *See Hoff v. Dept. of Corrections*, Dec. No. 36979 (WERC, 8/10/2017).

There is no dispute that DOC made a decision to take money away from Hoff as a result of his alleged 2015 misconduct that resulted in a November 2, 2016 letter of reprimand (and subsequent publicity). Secretary Litscher testified that if not for the letter of reprimand “we would not be here today,” and the decision to rescind the DMC award (and thus take money from Hoff’s future paychecks) was based on Hoff’s prior discipline. Hoff proved that DOC’s action to take money from him was disciplinary in nature. As the Commission previously stated, “[w]hether we characterize that loss as a reduction in base pay or a *de facto* demotion is not particularly significant.” *Id.* In either event, the Commission has jurisdiction.<sup>3</sup> *Id.*

DOC characterizes the \$178 deductions as an action to recoup overpayments made to Hoff in error. An employer is allowed to recoup overpayments previously made in error from an employee’s future paychecks. *Batteries Plus, LLC v. Mohr*, 244 Wis.2d 559, 562, 628 N.W.2d 364 (2001). In this case, however, there is no overpayment made in error.

Beier concluded that the award was granted in error because Hoff was ineligible for an award under the provisions of Section J-2.00(5)(a) of the 2015-2017 State Compensation Plan. That section prohibits awards to employees “who did not receive a performance evaluation in the last 12 months or were rated below satisfactory.” Although the provision could be written more precisely, its meaning is clear: an employee is ineligible for an award if he did not receive an evaluation within the past 12 months or if his performance was rated below satisfactory on an evaluation within the last 12 months.

Hoff received a performance evaluation on March 14, 2017, for the period July 11, 2016 through March 10, 2017. That evaluation was within the last 12 months before the April 19, 2017 award was granted.<sup>4</sup> According to Hoff’s last performance evaluation, he met or exceeded all standards for his job and thereby achieved satisfactory job performance.<sup>5</sup> He was eligible for an award according to Section J-2.00(5)(a). Contrary to Beier’s interpretation, nothing in Section J makes an employee *per se* or subjectively ineligible for a DMC award if he previously received discipline, such as the letter of reprimand Hoff received. Such subjective analysis is instead permitted in the appointing authority’s decision to grant or not grant an award.<sup>6</sup>

Secretary Litscher testified that he did not see or review Section J of the State Compensation Plan prior to the hearing. He relied upon Beier and her staff to determine if Hoff was eligible for an award. Nonetheless, when reviewing Section J for the first time, he testified that, in his opinion, Hoff was not eligible for an award under the provisions of

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<sup>3</sup> Had DOC denied Hoff a DMC award in April 2017, when he was nominated, the Commission would have no jurisdiction over this appeal.

<sup>4</sup> In her testimony, Beier also suggested that because Hoff’s last evaluation was not for a period of 12 months, it was a short evaluation and insufficient for award eligibility. The plain reading of Section J-2.00(5)(a) does not support such a requirement.

<sup>5</sup> Hoff’s last performance evaluation, Exhibit R5, has the stated purpose “[t]o identify major objectives and performance expectations / standards necessary to achieve *satisfactory* job performance and to record results” (emphasis added).

<sup>6</sup> Section J-2.00(1), provides, DMC “provisions allow the appointing authority the sole discretion to provide employees ... economic recognition for merit.”

Section J-2.00(5)(j)1. That section states: “Merit DMC will only be approved if one or more of the following criteria were considered: 1. The length or frequency of the outstanding performance.” Litscher testified that, in his opinion, Hoff’s 2015 misconduct, and the associated 2016 letter of reprimand, renders his performance of insufficient length and frequency to merit a DMC award.

Section J-2.00(5)(j)1 does not require that Hoff must perform outstanding service with sufficient frequency over a length of time to be eligible for a DMC award. Instead, the provision requires that the appointing authority *consider* the “length or frequency of the outstanding performance.” Hoff’s supervisor, superintendent, and DOC administrator of the Division of Juvenile Corrections all testified that they believed Hoff was eligible for an award and either recommended approval of or approved the award. There is no evidence in the record indicating those supervisory employees failed to consider Hoff’s “length or frequency of outstanding performance.” Instead, DOC merely demonstrated that the DOC secretary disagreed with the outcome of such consideration by Hoff’s superiors (who had the ability to grant or deny a DMC award under Section J-2.00(1)) or he believed such consideration was insufficient.

DOC did not find a pay error that required correction. A typical pay error may occur when an employer mistakenly gives an employee more money than what the employee earned and is entitled to receive. The employer therefore is justified to consider the overpayment an advance on future earnings.

In this matter, a DMC award was granted to Hoff after a multi-step approval process. Upon payment the award vested in him. It was and is his property.<sup>7</sup> These facts differentiate this case from several prior cases before the Commission in which State employees challenged the State’s decision to recoup money from future earnings. *Cf. Wilhorn, et al. v. Dept. of Natural Resources*, Dec. No. 35677 (WERC, 3/30/2015)(the Commission does not have jurisdiction over an agency’s decision to recoup overpayment from employees mistakenly overpaid for two hours of time, because the correction of such an error is not a reduction in base wages); *Schneider v. Dept. of Corrections*, Dec. No. 35678 (WERC, 3/30/2015)(the Commission does not have jurisdiction over an agency’s decision to recoup an insurance premium mistakenly paid by the State on behalf of an employee, because the correction of such an error is not a reduction in base wages); *Boyea v. Dept. of Corrections*, Dec. No. 33930-A (WERC, 2/1/2013)(the Commission does not have jurisdiction over an agency’s decision to characterize an employee’s unscheduled absence as leave without pay after he overdrew his sick leave account, because the employee suffered no reduction in base wages). In those prior cases, the employees had not earned or been granted money that vested in them. Any money paid in error was appropriately considered an advance on future earnings. The employer was within its rights to reduce future earnings to recoup the overpayment.

Here, DOC decided to take money away from Hoff as a result of misconduct he allegedly committed. Hoff was disciplined. DOC may only take Hoff’s earned money with just cause.

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<sup>7</sup> The award would have been granted in error if, for instance, DOC intended to give the award to another employee, but mistakenly paid it to Hoff. Under such circumstances, the money paid to Hoff would not be his property. DOC could consider the overpayment an advance on Hoff’s future earnings and recoup it.

## II. JUST CAUSE

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.

Litscher and Beier testified that the decision to rescind the DMC award and take money from Hoff was based on misconduct he allegedly committed in 2015 and for which he received a letter of reprimand on November 2, 2016. DOC has the burden of proof to establish that Hoff 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 produced no evidence of any misconduct Hoff allegedly committed in 2015. It is axiomatic that because DOC failed to prove misconduct occurred, DOC does not have just cause to discipline Hoff by taking money from him.

Signed at the City of Madison, Wisconsin, this 29th day of September 2017.

### **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman