

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MATTHEW DAVIS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0221

Case Type: PA

DECISION NO. 37276

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**Appearances:**

Sean Daley, Staff Representative, AFSCME Council 32, P.O. Box 19, Ashippun, Wisconsin, appearing on behalf of Matthew Davis.

Anfin Jaw, Attorney, Department of Administration, Division of Legal Services, 201 East Wilson St., 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

**DECISION AND ORDER**

On August 25, 2017, Matthew Davis filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for three days without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on October 11, 2017, in Waupun, Wisconsin. The parties made oral arguments at the conclusion of the hearing.

On November 3, 2017, Examiner Raleigh Jones issued a Proposed Decision and Order affirming the suspension. No objections were filed and the matter became ripe for Commission consideration on November 9, 2017.

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

**FINDINGS OF FACT**

1. Matthew Davis is employed as a correctional officer at the Wisconsin Resource Center and had permanent status in class at the time of his suspension.

2. The Department of Corrections (DOC) is a state agency responsible for the operation of adult correctional facilities, including the Wisconsin Resource Center located in Winnebago, Wisconsin.

3. DOC has a work rule that requires correctional officers to call in a minimum of 90 minutes before the start of a shift if they will not be reporting to work.

4. On June 8, 2017, Davis was scheduled to start work at 6:00 a.m. That day at 6:41 a.m. he called into work, said he was sick and would not be reporting that day.

5. Davis' call in on June 8, 2017, reporting his absence was untimely and violated DOC's absence reporting work rule.

6. Davis was issued a three-day suspension for his late call in.

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 over this appeal 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 suspend Matthew Davis 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 Matthew Davis by the State of Wisconsin Department of Corrections is affirmed.

Signed at the City of Madison, Wisconsin, this 22nd day of November, 2017.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**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.

Matthew Davis 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 Davis 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 has a work rule that requires correctional officers to call in a minimum of 90 minutes before their scheduled start time if they will not be reporting to work. This work rule allows the institution to find a replacement, hold staff over, and/or reassign staff in order to provide coverage for all posts.

On June 8, 2017, Davis was scheduled to start a shift at 6:00 a.m. That night he became ill and decided to miss his shift and use sick leave. Per DOC's call-in work rule, he was supposed to report his absence 90 minutes prior to the start of his shift. In the context of this case, that meant he was supposed to call in by 4:30 a.m. That did not happen. Instead, he called in at 6:41 a.m. and reported that he was sick and would not be in for his regular shift.

Davis violated DOC's absence reporting work rule when he failed to timely report his absence on June 8, 2017. He should have called in at least 90 minutes before his scheduled start time that day. He failed to do that, so discipline was warranted.

While Davis does not challenge the imposition of discipline for his June 8, 2017 work rule violation, he does object to that portion of the suspension letter that references a letter of expectation he received on January 31, 2017.

On December 27, 2016, Davis used a sick day. Afterwards, a question arose as to whether Davis had reported his absence that day with a timely call in (meaning 90 minutes before the start of his shift). The factual dispute centered on when Davis was scheduled to start

work that day; was it 8:00 a.m. or 7:00 a.m.? Davis alleged it was the former and DOC alleged the latter. Ultimately, DOC decided not to impose formal discipline on Davis for this matter, but decided instead to give him what it characterized as a “non-disciplinary letter of expectation.” That letter, which did not set forth any underlying facts, simply reiterated the requirements to report an absence. Specifically, it said that “uniformed staff are required to report their absence 90 minutes prior to the start of their scheduled shift.” After Davis received this letter of expectation, he tried to challenge it, but was unsuccessful in doing so.

We now pivot back to the suspension letter imposed here. In that letter, DOC first addressed the facts involved in the June 8, 2017 incident. After reviewing those facts, it then went on to reference the letter of expectation issued to Davis on January 31, 2017, and essentially cited it for the proposition that Davis had previously been advised of the proper procedure to report an absence in a timely fashion.

What Davis wants us to do in this case is decide the factual question which was not decided in that matter (i.e. whether his start time on December 27, 2016 was 8:00 a.m. or 7:00 a.m.). Building on that, he wants us to find that the letter of expectation was not warranted in the first place.

We decline to do so. We do not have jurisdiction to review letters of expectation. Section 230.44(1)(c), Stats., expressly limits our jurisdiction to just “demotion, layoff, suspension, discharge or reduction in base pay...” cases. This is not an exhaustive list of all the ways in which an employee can be disciplined. Certainly from an employee’s perspective, another form of discipline is a letter of expectation. However, a letter of expectation issued by a State agency to a State employee is not one of the named types of discipline referenced in Section 230.44(1)(c) that we are empowered to review. As a result, we cannot review the letter of expectation that DOC issued to Davis on January 31, 2017. That conclusion applies whether Davis had tried to appeal the letter of expectation when he received it, or here (where it was referenced in his suspension letter). Either way, the result is the same: we lack jurisdiction to review a letter of expectation.

Notwithstanding that conclusion, we think it is noteworthy that when DOC referenced the letter of expectation in the suspension letter, it did so merely to show that Davis knew what his call in obligations were because he had previously been advised what DOC’s procedure was for reporting an absence in a timely fashion. For the sake of discussion, even if we were to completely ignore the letter of expectation or throw it out on the grounds that it was not factually warranted, we have another basis in this case for concluding that Davis knew what DOC’s procedure was for reporting an absence in a timely fashion. It is this: he was previously disciplined for violating the absence reporting work rule.

That happened in 2015 when Davis received a three-day suspension for an untimely call in. In that matter, he did not report his absence 90 minutes prior to the start of his shift. That, of course, is the same infraction he is charged with here. Given that prior discipline for the same infraction he is charged with here, it is clear that Davis knew what DOC’s procedure was for

reporting an absence in a timely fashion (i.e. that he was to report his absence at least 90 minutes before the start of his shift).

Finally, we address the question of whether the discipline imposed here was excessive. The record shows that prior to the discipline imposed here, Davis had received the following suspensions: a one-day suspension in 2014; a three-day suspension in 2015; and a five-day suspension in 2015. Given those prior suspensions, the three-day suspension imposed here was not excessive.

In light of all of the foregoing, the Commission concludes that DOC had just cause to suspend Davis for three days.

Signed at the City of Madison, Wisconsin, this 22nd day of November, 2017.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman