

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVID HULCE, Appellant
vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0238
Case Type: PA

DECISION NO. 37445

Appearances:

Paul Maki, W7071 North Road, Mauston, Wisconsin, 53948, appearing on behalf of David Hulce.

Cara Larson, Attorney, Department of Administration, 201 East Wilson, 10th Floor, P.O. Box 7864, Madison, Wisconsin, 53707-7864, appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On March 1, 2018, David Hulce filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on April 17, 2018, in New Lisbon, Wisconsin, and the parties made oral argument at the hearing's conclusion.

On May 17, 2018, Examiner Raleigh Jones filed a Proposed Decision and Order affirming Hulce's one-day suspension. No objections were filed and the matter became ripe for Commission consideration on May 23, 2018.

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

FINDINGS OF FACT

1. David Hulce is employed as a correctional officer by the State of Wisconsin Department of Corrections (DOC) at the New Lisbon Correctional Institution and had permanent status in class at the time of his suspension.

2. DOC is an agency of the State of Wisconsin and operates the New Lisbon Correctional Institution (NLCI) in New Lisbon, Wisconsin.

3. Per DOC's attendance policy, employees who have more than six attendance occurrences in a calendar year can be disciplined.

4. Hulce had eleven attendance occurrences in 2017.

5. DOC suspended Hulce for one day for having more than six attendance occurrences.

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 suspend David Hulce for one day.

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

ORDER

The one-day suspension of David Hulce by the State of Wisconsin Department of Corrections is affirmed.

Signed at the City of Madison, Wisconsin, this 4th day of June, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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.

David Hulce 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 Hulce 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).

When a DOC employee is absent from work and uses regular sick leave (as opposed to FMLA leave), they are to provide a medical verification afterwards. This medical verification has to meet certain requirements (which need not be identified here). Additionally, this medical verification must be submitted when the employee returns to work. Late verifications are not permitted. If the employee provides timely medical verification after returning to work, then the absence is considered excused. However, if the employee does not provide timely medical verification after returning to work, then the absence is considered unexcused and the employee is charged with what is known as an occurrence. Per DOC's attendance policy, "excessive absenteeism occurs when an employee ... has within a calendar year more than 5 occurrences," and goes on to provide that when an employee has a sixth occurrence, a letter of expectation will be issued. If the employee has more occurrences than that, they face formal discipline. This rule is well known in the department.

Hulce was absent from work and used sick leave on August 16 and September 1 and 4, 2017. At issue here is whether those three absences constituted occurrences within the meaning of DOC's attendance policy.

Earlier that year, Hulce was absent from work and used sick leave on January 31, February 6 and 11, March 21, April 29, June 10 and 21, and July 11. Those eight absences were all categorized as occurrences because Hulce did not provide medical verification afterwards. Then on July 18, Hulce received a letter of expectation which notified him that his absences on June 10 and 21 and July 11 were his sixth, seventh, and eighth occurrences of the year.

Hulce was subsequently absent from work and used sick leave again on August 16 and September 1 and 4. While Hulce tried to present a medical verification for his absences on September 1 and 4, a supervisor rejected it. DOC subsequently determined that Hulce's absences on August 16 and September 1 and 4 counted as occurrences within the meaning of DOC's attendance policy. These three occurrences were his ninth, tenth, and eleventh for the year.

DOC's attendance policy clearly provides that employees can be disciplined for having more than six occurrences in a calendar year. Here, there is no question that Hulce had more occurrences than that (namely eleven). Given that number, the Commission has no choice but to conclude that Hulce committed workplace misconduct by having so many occurrences in a calendar year.

Hulce asserts that his conduct should nonetheless be excused and his discipline overturned because comparable coworkers were treated more favorably than he was. An employee who raises a disparate treatment claim has the burden of proving that contention.

The Commission has long recognized that disparities in discipline may, under certain circumstances, affirmatively defend against discipline despite the existence of misconduct. Underlying that position is the notion that if an employer treats one employee significantly more harshly than a similarly situated coworker for similar conduct inherent unfairness exists.

One of Hulce's exhibits identifies the occurrences that 30 of his coworkers at NLCI had in 2017. The lowest number of occurrences in that exhibit is 3 and the highest is 23. Eighteen of the employees referenced in that exhibit had six or more occurrences. When all of the occurrences in that exhibit are extrapolated and compared to Hulce, it shows that Hulce had more occurrences than 25 of his coworkers. Hulce's number (i.e. eleven) was not the highest. The exhibit shows that Hulce had one coworker with the same number of occurrences (i.e. eleven), and four coworkers who had more occurrences than Hulce did, with their number of occurrences for the year being 12, 13, 15, and 23. While the first three numbers are fairly close to Hulce's number (i.e. eleven), the last number (i.e. 23) is an outlier and in a class by itself. Hulce failed to properly enter into the record how these instances relate to disparate treatment. Moreover, while Hulce stated that none of these employees were disciplined for their occurrences, he did not prove that critical point by employee or employer testimony or use of their personnel files. He needed to prove that to show that disparate treatment existed. What the record does show is that two of Hulce's coworkers at NLCI were disciplined for their occurrences at the same time Hulce was. Specifically, Nicholas Sieber was disciplined for having seven occurrences and Cyle Keltner was disciplined for having ten occurrences. Sieber received a one-day suspension for his misconduct while Keltner received a five-day suspension for his. The discipline which Hulce received (i.e. a one-day suspension) is the first step in DOC's progressive discipline sequence. Additionally, that discipline was internally consistent with the punishment meted out to Sieber and was far less than Keltner's discipline. Given the foregoing, the Commission finds that the claimed disparity was not proven.

Hulce makes additional defenses alleging unfairly enforced sick leave policy and subsequent medical verification within the Department and states that the State was not timely in complying with open records/discovery requests in preparation of this hearing. The State

adequately responded to the charge of hindering discovery. Hulce's argument towards the Department's application of procedure regarding sick leave is absent any persuasive evidence. While the Examiner was liberal in the allowance of documentation into the record, said documentation was entered into the record after the testimony of witnesses and deprived Hulce from being able to verify/strengthen the presentation of the evidence and the State from being able to refute the same. As such, the argument presented by Hulce is without a solid foundation and will not be accepted by the Commission.

Signed at the City of Madison, Wisconsin, this 4th day of June, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman