

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD PETERSON, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0244

Case Type: PA

DECISION NO. 37461

Appearances:

Richard Peterson, 2055 South River Road, Rhinelander, Wisconsin, appearing on his own behalf.

David Rabe and Cara Larson, Department of Administration, 201 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On April 9, 2018, Richard Peterson 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 Peter G. Davis. A hearing was held on May 23, 2018, in Irma, Wisconsin. The State made oral argument at the hearing's conclusion, and Peterson filed written argument on May 29, 2018.

On June 18, 2018, Examiner Peter G. Davis filed a Proposed Decision and Order rejecting the one-day suspension of Richard Peterson issued by the State of Wisconsin Department of Corrections. No objections were filed and the matter became ripe for Commission consideration on June 26, 2018.

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

FINDINGS OF FACT

1. Richard Peterson is employed as a Corrections Unit Supervisor by the State of Wisconsin Department of Corrections (DOC) at the Lincoln Hills School and is a 24-year DOC employee with permanent status in class at the time of his suspension.

2. Peterson's DOC issued cell phone was stolen from his office by a youth incarcerated at Lincoln Hills on October 19, 2017 and recovered on November 2, 2017. During the period of time the cell phone was missing, Peterson was in his office during portions of five to six days and did not notice that the cell phone 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 suspend Richard Peterson 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 Richard Peterson by the State of Wisconsin Department of Corrections is affirmed.

Signed at the City of Madison, Wisconsin, this 3rd day of July, 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.

Richard Peterson had permanent status in class at the time of his suspension and his appeal alleges the suspension was not based on just cause.

The State has the burden of proof to establish that Peterson 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 suspension letter Peterson received identifies two bases for the discipline: (1) negligence for failing to notice his cell phone was gone; and (2) failing to carry/possess his cell phone at all times while at work.

As to basis (2) above, the evidence establishes that, prior to the incident in question, DOC was aware Peterson did not carry his cell phone with him and did not instruct him to begin to do so. In light of this evidence, DOC cannot now discipline Peterson for conduct it was aware of and had tolerated.

Turning to basis (1) above, it is clearly misconduct for an employee to fail to notice that a personally assigned cell phone has gone missing in a secure facility housing for youth offenders. To its credit, DOC acknowledges it was not the disappearance of the cell phone but rather the failure to timely notice and report its absence that warranted discipline. In effect, DOC acknowledges employees make mistakes from time to time and, in many instances, it is the failure to know a mistake was made or to promptly report the mistake that becomes problematic in terms of its consequences.

Here, Peterson grudgingly acknowledges he erred by failing to notice the cell phone had been stolen from his office by a youth offender but attacks the level of discipline as being excessive and disparate.

While a high-ranking DOC employee testified that in his opinion a written letter of instruction would have been sufficient as a corrective measure, DOC decisionmakers collectively

concluded that a higher level of discipline was appropriate.¹ Because a one-day suspension is the first formal step in the DOC progressive disciplinary structure, and because the Commission does not place itself in the role of micro-managing disciplinary judgments by inserting its own judgment as to how it would have proceeded, Peterson's "excessive" discipline argument is rejected.

The proposed decision suggests that the suspension should be overturned due to the presence of disparate treatment demonstrated between how DOC disciplined Peterson (with a one-day suspension) and his coworker (with a verbal reprimand). Peterson also discusses another separate incident where an employee's negligence was treated with a verbal reprimand only. Disparate treatment requires that similarly situated employees guilty of the same misconduct are treated alike. Upon a closer examination, a finding of disparate treatment towards Peterson cannot be supported.

Peterson argues concerns relating to incidents where (1) another employee was negligent in securing a teargas cannister which resulted in a youth offender causing property damage and safety concerns, and (2) a coworker who was negligent in locking the office where Peterson's cell phone was stolen. In both instances, the employee only received a verbal warning. Peterson thus suggests he was treated unfairly in comparison. Problematic to Peterson's assertion, DOC acknowledged it was not the disappearance of the cell phone that was the cause of the discipline, but the failure to timely notice and report the disappearance. In both of the cited examples, the negligence of the employee was treated with a verbal reprimand, and DOC stated that also would have been the case with Peterson **if he would have timely reported the missing status of the cell phone in question**. Peterson, in essence, was disciplined not for the loss of the phone but for being negligent in failing to discover the loss despite repeatable opportunities. In the examples Peterson would have us depend on as disparate treatment, the employees did not have a "discoverable," repeatable period in which to report and remedy that negligence. Here, for Peterson, days went by without reporting the missing cell phone and the failure to discover the negligence is clearly the basis DOC used in making the determination to discipline Peterson. As we have found in the past, "... the comparisons between employees within a specified group ... must involve the **same misconduct** occurring under similar circumstances." (Emphasis added). *Morris v. DOC*, Dec. No. 35682-A (WERC, 2015). The action that Peterson was disciplined for was wholly different than that of his coworkers. Thus, the disparate treatment argument is rejected,

Therefore, it is concluded that DOC had just cause to suspend Peterson for one day and the discipline is affirmed.

Signed at the City of Madison, Wisconsin, this 3rd day of July, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ Indeed, perhaps because this incident became public knowledge within 24 hours of the cell phone's recovery, the option of discharging Peterson was at least raised. Likely, because Peterson is a 24-year employee with a clean record, this option was not seriously considered.