

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TIMOTHY LUND, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0261

Case Type: PA

DECISION NO. 37767

Appearances:

Sean Daley, Field Representative, AFSCME Council 32, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of Timothy Lund.

Anfin Jaw, Attorney, Department of Administration, 101 E. 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 August 3, 2018, Timothy Lund filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for five 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 September 10, 2018, in Plymouth, Wisconsin. The parties made oral arguments at the hearing's conclusion.

On October 17, 2018, Examiner Jones issued a Proposed Decision and Order affirming the five-day suspension of Timothy Lund by the State of Wisconsin Department of Corrections. No objections were filed, and the matter became ripe for Commission consideration on October 23, 2018.

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

FINDINGS OF FACT

1. Timothy Lund is employed as a Corrections Food Service Leader 2 at the Kettle Moraine Correctional Institution (KMCI) in Plymouth, Wisconsin. He is a 6-year DOC employee and had permanent status in class at the time of his suspension.

2. One of Lund's work responsibilities is to ensure that inmates who work in the kitchen follow certain proscribed rules.

3. On February 17, 2018, Lund failed to ensure that inmates working in the kitchen followed certain proscribed rules.

4. Lund was suspended for five days for doing that.

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 Timothy Lund for five days.

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

ORDER

The five-day suspension of Timothy Lund by the State of Wisconsin Department of Corrections is affirmed.

Dated at the City of Madison, Wisconsin, this 1st day of November, 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.

Timothy Lund 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 Lund 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).

Lund supervises and instructs inmates who work in the kitchen at KMCI. He is responsible for ensuring that sanitation and safety guidelines are followed. The suspension letter alleges that on February 17, 2018 – while Lund was supervising the food preparation area – he failed to properly supervise inmates working in the kitchen in three respects.

First, that day, an inmate who was preparing vegetables cut his finger and had to be taken off KMCI's grounds for medical treatment. The inmate who cut himself was not wearing a cutting glove at the time. The purpose of a cutting glove is to prevent injury while using a knife. One of Lund's work responsibilities is to ensure that inmates who use knives in food preparation wear cutting gloves (to protect them). On the day in question, Lund tethered three knives to three work stations. It is unclear if Lund provided cutting gloves to all the inmates cutting in the kitchen. Even if he did he is also required to ensure that the inmates wear them. In July 2017, Lund was advised in writing that "inmates must wear a cutting glove when using a knife." That same memo went on to say: "Please keep reinforcing this with the inmates on a daily basis, and make sure you are giving them the gloves." Thus, it was Lund's responsibility to ensure that the inmates wore cutting gloves before they cut, even if they did not want to. Lund was standing next to the inmate when he cut himself. After it happened, Lund got a cutting glove out and placed it in front of another inmate who was using a knife without wearing a cutting glove. This action showed that Lund was aware of the requirement for inmates to wear cutting gloves while using knives. Lund then walked across the food preparation area whereupon the inmate who had the cutting glove placed in front of him instead threw it about 15 feet at Lund, who caught it in his hand. The inmate who threw the cutting glove at Lund then continued to cut vegetables without wearing a cutting glove. Lund allowed this to continue which was impermissible, and Lund should have mandated that the inmate put on the cutting glove (especially since another inmate who was not wearing a cutting glove had

just cut himself). Additionally, Lund should have verbally reprimanded the inmate for throwing the cutting glove at him. Insofar as the record shows, he did not.

Second, after the inmate cut his finger, Lund gave him first aid and unsuccessfully tried to get the bleeding to stop. What was problematic about Lund's conduct was he provided first aid to the inmate in the food preparation area (where food was present). The first aid should have been provided outside the food prep area because bloodborne pathogens can infect food.

Third, shortly before the inmate cut himself, the inmate who (later) threw the cutting glove at Lund approached Lund and made a quick punching motion at Lund with his right hand. This punching motion simulated a boxing punch. The inmate's punching motion did not touch Lund, nor did Lund reciprocate with any kind of punching motion to the inmate. After reviewing the incident on videotape, DOC concluded that the inmate's punching motion constituted horseplay. DOC does not want employees to either engage in horseplay with inmates or tolerate horseplay by inmates toward employees because it erodes their authority. What Lund should have done following the inmate's feigned punch to him was (1) admonish the inmate about doing it; and (2) report it to a supervisor so that the inmate could be held accountable for it. While Lund later told investigators that he verbally reprimanded the inmate for his fake punch, the inmate denied that Lund verbally reprimanded him over it. Regardless, the incident was never reported to a supervisor.

In all three of the incidents referenced above, Lund did not follow certain proscribed rules that exist at KMCI. That constituted workplace misconduct.

The record indicates that Lund has previously been disciplined as follows. In June 2013, he received a written reprimand for failing to report to work on time. In January 2017, he received a one-day suspension for taking leave without authorization. In October 2017, he received a three-day suspension for engaging in horseplay in the kitchen with an inmate.

It was in that context that Lund committed workplace misconduct again on February 17, 2018. As was its right, DOC decided not to overlook the incidents that occurred that date. Employers have the right to expect their employees to follow workplace rules. Here, though, Lund did not.

As to the level of discipline imposed here (a five-day suspension), a five-day suspension follows a three-day suspension in the DOC progressive disciplinary "schedule." Since that was the discipline imposed here, it was not excessive. Accordingly, the five-day suspension is affirmed.

Dated at the City of Madison, Wisconsin, this 1st day of November, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman