STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENNETH BRUEGGEMAN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case ID: 303.0013
Case Type: PA

DECISION NO. 38445

Appearances:

Kenneth Brueggeman, 4702 Splint Road, Madison, Wisconsin, appearing on his own behalf.

Cara Larson, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Workforce Development.

DECISION AND ORDER

On March 23, 2020, Kenneth Brueggeman 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 Workforce Development. The appeal was assigned to Examiner Raleigh Jones. A telephone hearing was held on May 14 and May 20, 2020. The parties made oral argument at the hearing's conclusion.

On June 24, 2020, Examiner Jones issued a Proposed Decision and Order affirming the suspension. Brueggeman filed an objection on July 1, 2020 and the State did not file a response. The matter became ripe for Commission consideration on July 9, 2020.

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

FINDINGS OF FACT

1. Kenneth Brueggeman (Brueggeman) is employed as a Claims Specialist – Advanced by the State of Wisconsin Department of Workforce Development (DWD) and had permanent status in class at the time of his discipline.

2. DWD has an attendance policy. Under that policy, employees who use more sick leave than they earn in a quarter for unanticipated absences have excessive absences and can be disciplined for same.

3. Brueggeman used more sick leave for unanticipated absences in a quarter than he earned.

4. DWD considered the absences referenced in Finding 3 to be excessive and suspended Brueggeman for one day 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 over this appeal pursuant to Wis. Stat. § 230.44 (1)(c).

2. The State of Wisconsin Department of Workforce Development had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Kenneth Brueggeman 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 Kenneth Brueggeman by the State of Wisconsin Department of Workforce Development is affirmed.

Issued at Madison, Wisconsin, this 14th day of July, 2020.

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.

Kenneth Brueggeman 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 Brueggeman 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).

DWD has an absenteeism policy. In the "Purpose" section of the policy, it states that "the Department must have sufficient levels to meet its business needs …." The policy goes on to set various "thresholds for reviewing sick leave usage/unscheduled absences/tardiness." The policy states that "thresholds have been identified because they represent situations that disrupt business operations or reduce productivity." The threshold which is applicable here is this one:

- Unanticipated absences in excess of sick leave earned or projected to be earned in a quarter;

A full-time state employee earns 32.5 hours of sick leave in a quarter (i.e. 90 days). That means that if a full-time state employee uses more than 32.5 hours of sick leave for unanticipated absences in a rolling 90-day period, then their absences are collectively considered excessive, and they have violated that policy.

Brueggeman used sick leave five times between October 28, 2019 and January 8, 2020 to cover unanticipated absences. Each time he used eight hours of sick leave for a total of 40 hours. These absences occurred on October 28, October 29 and December 3, 2019 and on January 3 and January 8, 2020.

Since Brueggeman used more sick leave than he earned in that rolling 90-day period, our initial presumption is that he violated the policy referenced above unless a legitimate reason exists to find otherwise.

Brueggeman avers that a legitimate reason does exist which excuses his non-compliance with DWD's absenteeism policy. He asks that his suspension be overturned.

Before we address that reason though, we have decided to note the following to give context to the discussion which follows. First, Brueggeman averred at the hearing that he has numerous longstanding medical issues. The Commission accepts his assertion at face value. Second, it is noted that when the five absences referenced above occurred, Brueggeman did not have a FMLA request on file for 2020. As will be noted below, that subsequently changed.

The focus now shifts to some facts that relate to Brueggeman's claim. In January 2020, after all five of his absences occurred, Brueggeman's supervisor, Grulke, gave him information about filing for accommodations and FMLA. In doing so, she did not tell him to file for anything; she simply gave him the information. She also gave him the name of DWD's Medical Issues Coordinator, Morgan Dixon.

Brueggeman and Dixon subsequently exchanged numerous emails. The substance of those emails is identified below.

On January 14, 2020 (all dates hereinafter occurred in 2020) Brueggeman requested information on medical accommodations from Dixon. Dixon responded that same day with general information about the accommodation process and applicable forms. On February 6, Brueggeman filed a completed disability accommodation request form with DWD wherein he asked to be allowed to work from home and to be allowed to use sick days without penalty. On February 10, Brueggeman asked Dixon to send him FMLA instructions. Dixon sent him the FMLA paperwork that same day. In his email to Brueggeman, Dixon stated that "most likely, FMLA is more appropriate than an accommodation as to what you are seeking (not to accrue unanticipated absences under the absenteeism policy) is exactly what FMLA is designed to address." On February 17, Dixon sent Brueggeman an email which denied his accommodation request. Attached to the email was an "Accommodation Memorandum" which provided in pertinent part:

> The Affirmative Action Equal Employment Opportunity section of DWD received your accommodation request paperwork on 02/06/20. The Division has completed its review and unfortunately, we must DENY your requests to work-from-home and to be exempted from the relevant Attendance and Absenteeism policies when your medical condition renders you unable to work.
>
> At this time, the Division's phone systems and software do not function in such a way that would allow you to perform your duties from a remote location.
>
> You ARE eligible for FMLA leave and may utilize the hours provided under the federal and state statutes for absences related to your serious health condition. Morgan Dixon, Medical Issues/FMLA Coordinator, will be happy to talk with you and get you set-up to take leave.

In Dixon's email, he urged Brueggeman to send him his completed FMLA paperwork as soon as possible. On February 18, Brueggeman filed a completed FMLA request form with DWD. On February 19, Dixon notified Brueggeman via an email that he met the eligibility requirements for

FMLA. Attached to that email was a document entitled FMLA Notice of Eligibility. The email notified Brueggeman that he needed to complete the medical certification form. On February 25, Brueggeman filed a completed FMLA medical certification form with DWD. On February 26, Dixon emailed Brueggeman and confirmed that DWD received the completed medical certification form. On March 1, Dixon notified Brueggeman that his request to use FMLA leave in 2020 had been approved. Attached to this email was an FMLA Designation Notice. In both Dixon's email and the Designation Notice, it indicated that Brueggeman was approved to use FMLA leave "on an intermittent basis, effective 01/20/2020 through 12/31/2020, to care for a serious health condition." On March 13, Brueggeman sent Dixon an email asking if the date for which he is approved to use FMLA could be backdated to before January 20, because the "first two weeks of January was when I had the serious medical issues." Dixon responded in the negative, stating "it cannot go back any further" than January 20, because January 20 is "30 days prior to the date you first submitted a piece of FMLA paperwork." Dixon also said, "we cannot accept other non-FMLA paperwork for FMLA purposes."

As noted at the conclusion of the preceeding paragraph, Brueggeman requests that his 2020 FMLA approval be backdated to a date before the date set by DWD for his FMLA coverage (i.e. January 20). If that were granted, Brueggeman's January 3 and January 8, 2020 absences could be retroactively covered by FMLA and he would not have reached the threshold for excessive absences under DWD's absenteeism policy.

Before we address that claim though, we have decided to emphasize why DWD selected January 20 as the start date for Brueggeman's 2020 FMLA coverage. It is this. After an employee is approved for FMLA coverage, they can obviously use it prospectively to cover absences, but they can also use it retroactively for a 30 day period. While one would think that this 30-day retroactive period would start on the date the Employer approved the FMLA request (which in this case was March 1) and run backward from there, but that is not the case. Instead, the record shows that DWD starts the 30-day retroactive period on the date the employee submits his/her completed FMLA request form to DWD. As already noted, Brueggeman submitted his completed FMLA request form on February 18. When one counts backward 30 days from February 18, the date is January 20. That is the basis for DWD's decision to find that Brueggeman's FMLA coverage period started January 20.

Brueggeman asserts that had he applied for FMLA earlier than he did, it would have been approved earlier that it was. That assertion certainly seems logical. Brueggeman avers that the reason he did not apply for FMLA earlier than he did was because his supervisor allegedly told him to apply for an accommodation when, it turns out, he should have applied for FMLA. Thus, Brueggeman points the proverbial finger of blame at his supervisor for allegedly giving him bad information. The Commission finds this criticism misplaced because Brueggeman's supervisor did not tell him to apply for an accommodation. All she did was give him information about both accommodations and FMLA; the rest was up to Brueggeman.

Brueggeman also argues that the 30-day FMLA retroactive period should run in his case from the date he filed for an accommodation (which happened on February 6), rather than the date he filed for FMLA (which happened February 18). He cited no law to support that proposition and

the Commission is unaware of any that requires the result Brueggeman seeks here. What Brueggeman is essentially asking us to do is apply a portion of one federal law (namely, the FMLA law and its retroactive provision) to a completely different law (the federal law covering accommodations in the workplace). Simply put, the Commission is not empowered to do that. Given the foregoing, the Commission rejects Brueggeman's request to have the 30-day FMLA retroactive period run in his case from the date he filed for an accommodation.

In our view, DWD proffered a legitimate, non-discriminatory reason why it started Brueggeman's 2020 FMLA coverage on January 20, 2020. Notwithstanding Brueggeman's claim to the contrary, it was not obligated to begin it sooner than that. In so finding, it is expressly noted that the record shows that Brueggeman has been granted, and used, FMLA leave in the past. Specifically, he used FMLA leave in 2010, 2014, 2017 and 2019. In each of those years, he asked for FMLA leave and his request was approved. That past usage establishes that Brueggeman was aware of the various steps involved in the FMLA approval process. If he wanted to renew his FMLA coverage for 2020, it was his responsibility to do so.

Based on the above, the Commission finds that DWD had just cause to discipline Brueggeman for his excessive absences. The various defenses proffered by Brueggeman are insufficient to excuse his misconduct.

The final question is whether the discipline that was imposed here (i.e. a one-day suspension) was excessive. The Commission finds it was not for these reasons. First, the record shows that Brueggeman was formally counseled about his attendance issues on June 15, 2017; January 12, 2018; and July 10, 2019. These formal counselling sessions establish that his attendance was of longstanding concern to the Employer. Second, the record establishes that Brueggeman received a one-day suspension on January 28, 2019 for an attendance matter. We find that another one-day suspension was not an excessive punishment under the circumstances. Accordingly, the Commission concluded there was just cause for Brueggeman's one day suspension.

Issued at Madison, Wisconsin, this day 14th of July, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman