

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CORY SMITH, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0522

Case Type: PA

DECISION NO. 39469

Appearances:

Eric Drangstveit, N8843 Flood Road, Black River Falls, Wisconsin, appearing on behalf of Cory Smith.

Nicole M. Porter (Rute), 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 April 25, 2022, Cory Smith filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Corrections (DOC).

A telephone hearing was held on July 7, 2022, by Commission Examiner Anfin Jaw. The parties submitted written argument on July 18, 2022. The parties filed written responses on July 20, 2022. A Proposed Decision and Order rejecting the discharge was issued by Examiner Jaw on August 2, 2022. DOC filed objections to the Proposed Decision on August 8, 2022. Smith did not file a reply by the deadline given of August 13, 2022.

Being fully advised on the premises and having considered the matter, the Commission makes and issues the following:

FINDINGS OF FACT

1. Cory Smith was employed by the State of Wisconsin Department of Corrections (DOC) as a correctional officer at Jackson Correction Institution (JCI) for almost 24 years and had permanent status in class when he was discharged.

2. JCI is a correctional facility located in Black River Falls, Wisconsin operated by the DOC, an agency of the State of Wisconsin.

3. On December 9, 2021, while off duty, Smith was arrested by police for Operating While Intoxicated (OWI), first offense.

4. Pursuant to its standard disciplinary progression and Smith's existing disciplinary record, DOC discharged Smith for the conduct referenced in Finding 3.

5. DOC did not demonstrate a sufficient nexus between Smith's classification specification and the OWI referenced in Finding 3.

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 Corrections did not have just cause within the meaning of Wis. Stat. § 230.34 (1)(a) to discharge Cory Smith.

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

ORDER

The discharge of Cory Smith by the State of Wisconsin Department of Corrections is rejected. DOC shall reinstate Smith and make him whole including interest.

Issued at Madison, Wisconsin this 22nd day of August, 2022.

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.

Smith had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that Smith 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).

On December 9, 2021, while off duty, Smith drank alcohol at a friend's home while watching a football game. He later walked to a bar and had one more drink. He then chose to drive his car and was pulled over for a faulty headlight and going 9 mph over the speed limit. He was subsequently issued an Operating While Intoxicated (OWI), first offense citation. Smith has not been found guilty of the OWI-1st offense.

DOC has a work rule that says whenever an employee has "police contact" they are to notify their supervisor of their police contact within a certain time frame. Smith complied with this directive and notified his supervisor of his police contact on December 10, 2021, and his arrest for OWI.

Afterwards, DOC conducted an investigation into the matter. After its investigation was completed, DOC concluded that Smith's conduct and arrest on December 9, 2021 violated Work Rule #25. That Rule provides:

Engaging in any outside activities (including violations or convictions of criminal or other laws) which may impair the employee's independence of judgment or impair the employee's ability to perform his/her duties as an employee of the state.

In the March 11, 2022, discharge letter, DOC opined on why Smith's arrest for OWI was problematic for the department, and the connection/nexus between his OWI arrest and his duties as a correctional officer. It provided:

The Department and its employees have a responsibility to the public to ensure that correctional, rehabilitation and treatment programs are carried out in a legal, effective, safe and humane manner. As such, employees, especially Correctional Officers, are held to a high standard of expectations regarding their conduct both on and off duty. Executive Directive 42 is clear in stating an employee who is charged with or convicted of an offense occurring on or off duty may be subject to discipline for the conduct which gave rise to the charge or conviction if it meets the just cause threshold. As a Correctional Officer with the DOC, you are expected to adhere to the laws of the State of Wisconsin and to set an example for the persons in our care (PIOC) you supervise. In addition, your job functions require you to provide effective counsel to PIOC's seeking assistance with their rehabilitative needs, which could include drug or alcohol. In your statements to DOC investigators, you stated that you made the decision to drive home after drinking alcohol. As a Correctional Officer, you are called to be a positive rehabilitative influence through your conduct. However, your behavior the night of December 9, 2021, is not demonstrative of your ability to serve as such influence or example to the PIOC's and the community you serve. You also described your job as a Correctional Officer to include drive [sic] PIOC's to appointments outside of the institution and so the institution functions properly. Your decision to drive on December 9, 2021, put you and members of the community at risk of harm or injury.

The basic question to be answered here is whether Smith's arrest for OWI was substantially related to his job with DOC. If it was, then his OWI arrest constituted misconduct within the meaning of Work Rule #25 and he could be disciplined for that. However, if his OWI arrest was not substantially related to his job, then his OWI arrest did not constitute misconduct within the meaning of Work Rule #25 and he could not be disciplined for that.

Smith relies on the case of *LePage v. DOC*, Dec. No. 39276 (WERC, 12/21) and sees it as dispositive here. In *LePage*, the Commission relied on its the reasoning in *Johnson v. DOC*, Dec. No. 36747 (WERC, 2/17).

In *Johnson*, the Commission overturned the ten-day suspension of a DOC employee who had been charged with OWI. The Commission's stated rationale for doing so was "that driving was not a part of his regular duties." Building on that, the Commission found "there is insufficient evidence to conclude that the [OWI] charge was substantially related to Johnson's employment as a corrections officer." See pg. 4.

When someone is arrested for OWI in Wisconsin, their driving privileges are suspended. As just noted, in *Johnson*, the Commission found that Johnson did not need a driver's license to perform his job duties as a correctional officer. Similarly, in *LePage*, the Commission found that LePage did not need a driver's license to perform his job duties as a youth counselor. As stated in *Johnson*, for just cause to exist in determining whether discipline is appropriate for off-hours conduct, there must exist a nexus between the conduct and the work duties expected of the employee. The employee's behavior must directly impinge upon the employer's operational interests.

Here, DOC attempts to establish this nexus by arguing Smith was assigned a Transportation/Utility officer post at the time of his off-duty OWI arrest, and that the Department's expectations for Correctional Officers who work in driving posts are that they maintain a valid driver's license. This is insufficient to establish the nexus between Smith's off-duty conduct and the employer's legitimate operational interests, as the record establishes that Smith's classification as a Correctional Officer does not require a valid driver's license. When Smith became ineligible for his assigned post, he was moved to a Utility Officer post. Clearly, Smith does not need a driver's license to perform his job duties as a correctional officer. Apparently, DOC conflates the position of Smith (i.e., Correctional Officer) with his post (i.e., Transportation Officer). Smith's position is what dictates the standard for which to judge whether the appropriate nexus between job duties and off-work conduct exist, not his posting. While driving was a central component to the posting, it is not central to the position as demonstrated by DOC's relative ease in re-assigning Smith to a Utility Officer posting following the issuance and self-reporting of the citation.

DOC's objections to the proposed decision are unpersuasive and repetitious from previous matters before the Commission involving off-duty conduct. DOC's argument relating to role-modeling and the standard set by Correctional Officers to inmates is problematic. In addition to the speculative nature of the claim, in their objection to this decision DOC states: "The demonstrated propensity to engage in off-duty misconduct becomes fundamentally inconsistent with the supervision of such individuals, creates a credibility issue for the Department, and can negatively impact the mission of the Department." See Respondent's Objection to the Proposed Decision, pg. 3-4. This argument supports the discharge of an employee for their off-duty conduct, not the following of progressive discipline as in the present case.¹ In other words, if a DUI is so fundamentally adverse to the functioning of the duties of the position as DOC argues, then the logical level of discipline to be levied in each and every case is automatic discharge regardless of the employees length of service or prior disciplinary history. To be certain, there are circumstances where the off-work conduct of an employee rises to such a level as to render continued employment of an individual with DOC as no longer viable for the very reasons DOC now argues. WERC has upheld discharges in such instances.²

Given the foregoing, it is concluded there was not just cause for Smith's discharge, and it is therefore rejected. Smith shall be reinstated and made whole including interest³ consistent with the outcome of this order.

¹ Although the action before us is the discharge of Smith, it is noted that the level of discipline imposed is due to Smith facing the last step in progressive discipline. Had Smith not had prior discipline, DOC would in all likelihood have given Smith a one-day suspension as a first-step penalty.

² See *Castillo v. DOC*, Dec. No. 37487 (WERC, 9/18) where the employee was cited for an OWI but attempted to use her position as a DOC employee to get out of the citation. The discharge was supported by Castillo's attempt to abuse her position for personal gain, not the underlying DUI itself.

³ See Wis. Admin. Code § ERC 94.07.

Issued at Madison, Wisconsin this 22nd day of August, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman