

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES THOMAS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION, Respondent.

Case ID: 446.0036

Case Type: PA

DECISION NO. 39475

Appearances:

Cher Thomas, 1800 E. 8th Street, Merrill, Wisconsin, appearing on behalf of James Thomas.

David G. Makovec, 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 Transportation.

DECISION AND ORDER

On May 17, 2022, James Thomas filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Transportation.

A telephone hearing was held on August 4, 2022, by Commission Examiner Anfin Jaw. The parties made oral argument at the conclusion of the hearing. On August 16, 2022, Examiner Jaw issued a Proposed Decision and Order affirming the discharge. The parties did not file objections to the Proposed Decision by the deadline given of August 22, 2022.

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

FINDINGS OF FACT

1. James Thomas was employed by the State of Wisconsin Department of Transportation (DOT), Division of Motor Vehicles (DMV), as a DMV Customer Service Representative-Advanced in Merrill, Wisconsin. He had permanent status in class when he was discharged.

2. On February 1, 2022, Thomas was intoxicated and under the influence of alcohol while on duty, conducting driver license examinations or road tests.
3. Thomas did not wear a facemask, as required, while conducting road tests.
4. DOC discharged Thomas for the conduct referenced in Finding 2.

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 Transportation had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge James Thomas.

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

ORDER

The discharge of James Thomas by the State of Wisconsin Department of Transportation is affirmed.

Issued at Madison, Wisconsin, this 13th day of September, 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.

James Thomas 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 Thomas 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).

Thomas was a DMV Customer Service Representative at the Merrill DMV Service Center. Part of his responsibilities included conducting driver license examinations or road tests for all classes of driver licenses. On February 1, 2022, between 9:00AM to 11:00AM, Thomas administered three road tests. At the time, all examiners conducting road tests were required to wear a face mask while interacting with an applicant or administering the road test. It is undisputed that Thomas did not wear a face mask, as required, when he conducted the three road tests. Sometime that morning, the mother of a road-testing applicant called the police and reported that a DMV employee named Jim, who conducted her daughter's driving test, was possibly intoxicated because he smelled of intoxicants and was acting strange.

At around 11:30AM, the City of Merrill Police Department responded to the DMV. Merrill PD Officer Dane Mathwich met privately with Thomas and advised him of the complaint. Thomas agreed to perform a preliminary breath test (PBT), and admitted he had a lot of alcohol to drink the previous night. The PBT had a result of 0.105. Thomas requested a second test, which resulted in a PBT of 0.10. Thomas admitted to driving to work that morning, and that he was only a passenger while conducting the road tests. Officer Mathwich ended the investigation because he did not observe Thomas driving and determined that no other criminal acts had occurred.

Thomas then reported his police contact to his DMV Team Leader and coworker, Maraline Collins. Thomas confessed to Collins that he had "partied hard the night before" and that this was the "aftereffects of partying." Mike McKenzie, Thomas' direct supervisor, later became aware of the customer complaint and police contact and spoke to Thomas about his conduct. Thomas

admitted to McKenzie that he “had a rough night and had a few cocktails.” Subsequently, DOT placed Thomas on administrative leave.

Afterwards, DOT conducted an investigation into the matter. After its investigation was completed, DOT concluded that Thomas’ conduct violated multiple work rules. On March 9, 2022, DOT discharged Thomas for his conduct on February 1, 2022. The discharge letter Thomas received states in relevant part:

This letter is to inform you that your employment as a DMV Customer Service Representative Specialist at the Department of Transportation, Division of Motor Vehicles, Merrill and Antigo DMV Service Centers is terminated effective March 9, 2022.

This action is based on violation of the following State of Wisconsin work rules:

State of Wisconsin Work Rules

- #1 – Falsification of records, knowingly giving false information or knowingly permitting, encouraging or direction [sic] others to do so. Failing to provide truthful, accurate and complete information when required.
- #3 – Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments, directions, or instructions.
- #15 – Possession of a controlled substance or analog without a prescription while on duty; manifesting signs of having consumed alcohol, or illegal drugs’ or reporting to work or working in an impaired condition so as to be unsafe to the employee, others, or physical property.

State of Wisconsin Serious Misconduct Work Rule

- #3 – While on duty, being intoxicated or under the influence of a controlled substance, as defined in s. 961.01(4) or a controlled substance analog, as defined in s. 961.01(4m).

Specifically, on Tuesday, February 1, 2022, evidence shows you were intoxicated and under the influence of alcohol while on duty. You conducted road tests in this condition, placing yourself, the drivers, the motoring public and the Department at risk. Furthermore, you failed to wear a facemask as required when conducting road tests that morning.

An Investigatory Interview was conducted on Thursday, February 3, 2022 including you, Mike McKenzie and Stephanie Gehrand. A Pre-disciplinary meeting was held on Tuesday, February 8, 2022 including the same parties. During the investigation you acknowledged you were aware of the State of Wisconsin Work Rules and the DMV Code of Conduct policies. You stated you reported to work at 6:45am on Tuesday, February 1, 2022 and conducted road tests that morning. You acknowledged that you did not follow the work directive that requires an examiner to wear a mask while conducting road tests. You stated that at 11:48am you had been approached by law enforcement to [sic] following up on an anonymous tip

that you were drinking on the job, stating that you had not consumed any alcohol that day. You submitted to a portable breathalyzer test administered by Merrill PD which showed a result of 0.10. During the investigation process there were discrepancies in the statements you provided to your supervisor, manager and the law enforcement officer on Tuesday, February 1, 2022 regarding your alcohol consumption between 6 pm Monday, January 31 and the time of the police contact on Tuesday, February 1.

The Commission has no hesitation finding that Thomas' PBT result on February 1, 2022, along with his admissions, constituted intoxication or under the influence of alcohol, while on duty, and therefore Thomas committed serious misconduct. His conduct was especially egregious given the fact that he was administering road tests while intoxicated.

Thomas now requests the Commission to consider mitigating circumstances; that he suffers from Auto Brewery Syndrome (ABS), a rare medical condition that makes you intoxicated without drinking alcohol. This condition happens when a person's body turns sugary or starchy foods (carbohydrates) into ethanol or alcohol. According to Thomas, he did not know he suffered from ABS until the February 1, 2022, incident at work, and therefore his discipline should be rejected, and he should be reinstated.

Thomas provided no medical evidence that he is diagnosed with ABS. In fact, the record suggests the contrary. On February 2, 2022, Thomas requested FMLA for a serious medical condition. A medical certification was sent to Thomas' medical provider on February 11, 2022. On March 4, 2022, DOT received the certification in which Thomas' medical provider opined that there is no evidence to suggest that Thomas "has a condition that would elevate his PBT levels without the consumption of alcohol."

Given the foregoing, the Commission concludes that Thomas engaged in serious misconduct. Furthermore, there was just cause for Thomas' discharge and it is therefore affirmed.

Issued at the City of Madison, Wisconsin, this 13th day of September, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman