

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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KEVIN SOMMER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0571

Case Type: PA

DECISION NO. 39901

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Appearances:

Rory Schneider, N6274 County Road Y, Fond du Lac, Wisconsin, appearing on behalf of Kevin Sommer.

David Makovec, Attorney, 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 Corrections.

**DECISION AND ORDER**

On January 30, 2023, Kevin Sommer 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 (DOC).

A hearing was held on March 14, 2023, by Commission Examiner Anfin Jaw. The parties made oral argument at the end of the hearing. On March 27, 2023, Examiner Jaw issued a Proposed Decision and Order affirming the one-day suspension by DOC. Sommer filed objections to the Proposed Decision on April 3, 2023. DOC filed a response on April 4, 2023.

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

**FINDINGS OF FACT**

1. Kevin Sommer is employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Sergeant at Dodge Correctional Institution (DCI), and he had permanent status in class at the time of his suspension.

2. DCI is a correctional facility located in Waupun, Wisconsin operated by DOC, a state agency of the State of Wisconsin.

3. On October 3, 2022, Sommer failed to disable his Apple watch's cellular capabilities while on duty, against DOC policy.

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 have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Kevin Sommer 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 Kevin Sommer by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 14<sup>th</sup> day of April, 2023.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

Section 230.34(1)(a), Stats., states in pertinent part:

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.

Kevin Sommer 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 Sommer 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).

It is undisputed that Sommer failed to disable his Apple watch's cellular capabilities while on duty, against DOC policy on October 3, 2022. Sommer was observed talking into his watch or possibly texting on his watch while on duty. DOC initiated an investigation and Sommer admitted to not turning off the cellular capabilities on his Apple watch. Smart watches without cellular capabilities or smart watches with disabled cellular capabilities are allowed to be worn in the institution. However, smart watches with activated cellular capabilities, similar to cell phones, are considered contraband and not allowed in DOC institutions. Therefore, misconduct has been established.

Nevertheless, Sommer asserts that his discipline should be rejected due to the allegation of disparate treatment in comparison to other discipline that has been issued at DCI. In order for the Commission to reach a conclusion as to the existence of disparate treatment, a grievant must demonstrate that they are being treated differently than another employee who is a) similarly situated, for b) similar conduct. *See Morris v. DOC*, Decision No. 35682-A (WERC, 07/15). We will briefly address the three examples presented by Sommer.

Lieutenant C. T. was issued a Letter of Expectation (LOE) from DCI for bringing his cell phone into the institution in April 2021. Lieutenant C.T. realized that he accidentally brought his cell phone into the institution and self-reported that he had his phone. He then took his phone out of the institution and to his vehicle. The DOC explained that C.T. could have simply brought his cell phone back to his vehicle without reporting the violation and the department would not have known. While it is DOC's standard practice that it follows formal progressive discipline for a work rule violation involving bringing a cell phone or cellular capable device into the institution, based

on C.T.'s self-report, an LOE was appropriate. Thus, the circumstances surrounding C.T.'s LOE do not satisfy the disparate treatment test.

Correctional Sergeant M.M. was issued a one-day suspension from DCI for bringing a portable extended storage hard drive and Apple AirPods into the institution on three occasions, while on duty. Sergeant M.M. intentionally concealed the items by bypassing the metal detector and x-ray machines because he knew they were contraband or not approved items to bring into the institution. Comparatively, Sommer argues that he was not deceitful like M.M., but was forthcoming about his Apple watch and therefore contends he should not have received the same level of discipline as M.M. However, the misconduct engaged by M.M. is not similar to the misconduct engaged by Sommer. M.M.'s device did not have the external communication and internet connectivity capability of Sommer's Apple watch, making it different in the capability and concerns associated with it. Both were issued standard formal progressive discipline for a violation of a work rule or policy. M.M.'s one-day suspension does not satisfy the disparate treatment test.

Lastly, Correctional Officer K.M. was issued a "no-action" letter from DCI for wearing a smart watch that was not connected to cellular capabilities or used as a cellular device. Staff are allowed to wear smart watches, as long as the cellular capabilities are disabled. Officer K.M. did not violate the DOC policy against activated cellular devices inside the institution. Therefore, K.M.'s lack of discipline cannot be compared to Sommer's discipline.

Given the foregoing, Sommer's one-day suspension is affirmed.

Issued at Madison, Wisconsin, this 14<sup>th</sup> day of April, 2023.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman