

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANDY J. EWING, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0576

Case Type: PA

DECISION NO. 39916

Appearances:

Andy Ewing, 74 Myrna Jane Drive, Oshkosh, Wisconsin, appearing on his own behalf.

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 March 9, 2023, Andy Ewing 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 telephone hearing was held on April 20, 2023, by Commission Examiner Peter G. Davis. The parties made oral argument at the conclusion of the hearing. DOC filed written argument on May 26, 2023, and Ewing did not file any additional argument by the deadline of June 2, 2023.

On June 6, 2023, Examiner Davis issued a Proposed Decision affirming the one-day suspension of Andy Ewing by DOC. No objections were filed by the parties by the deadline given of June 12, 2023.

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

FINDINGS OF FACT

1. At the time of his suspension, Andy Ewing, herein Ewing, was employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Sergeant at the Drug Abuse Correctional Center and had permanent status in class.

2. Ewing made a demeaning comment about an inmate while that inmate and other inmates were present and could hear the remark.

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 Andy Ewing 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 Andy Ewing by the State of Wisconsin Department of Corrections is affirmed.

Issued at the City of Madison, Wisconsin, this 26th day of June 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Wisconsin Stat. § 230.34(1)(a) states in pertinent part that “An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.”

Wisconsin Stat. § 230.44(1)(c) 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.”

Ewing had permanent status in class at the time of his suspension and his appeal alleges that the State did not have just cause to suspend him.

The State has the burden of proof to establish that Ewing was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the decision imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

Ewing works in a facility designed to treat and rehabilitate persons who have been convicted of drug offenses. Inmates participate in programming designed to assist them in reintegrating into society. Such programming seeks to instill the value of pro-social behavior, being courteous, and treating others with respect.

Ewing is alleged to have told one inmate in the presence of other inmates “You remind me of one of those Swedish kids that can’t see their own penis.” The comment provoked laughter at the time but was later reported to DOC staff by an inmate who was concerned with the impact the remark had on the mental well-being of the target of the remark.

Ewing asserts that he only said “You look like a French statue.”¹ and argues that the report of the incident was retaliation for his having issued sanctions against certain inmates who were present. Ewing was given the opportunity to have records of the sanctions added to the record after the hearing. A review of those records indicate that no pre-incident sanctions were imposed by Ewing on the inmate who reported the incident. Thus, there is no support in the record for Ewing’s retaliation claim. Even if there were, the record as a whole satisfies the Commission that Ewing made the remark in question. In this regard, the Commission notes that a record of a prior suspension received by Ewing reflected a history of making inappropriate remarks to inmates. Further, DOC points out that there are serious consequences for inmates if they falsely report employee conduct. Lastly, it seems improbable that the phrase Ewing claims he said would have prompted laughter from the inmate group.²

¹ It can well be argued that mocking an inmate’s weight is misconduct in and of itself.

² Ewing argues that the investigation was flawed because a statement from one inmate was not accepted/considered. Whatever that statement might have said, the multiple statements of inmates that formed the basis for the DOC conclusion would far outweigh the content of a single statement.

As to the issue of whether his misconduct provided just cause for a one-day suspension, the impact of the remark on the inmate, especially in the context of the institutions programming mission, makes it clear that this was misconduct worthy of a one-day suspension. Therefore, the suspension is affirmed.

Issued at the City of Madison, Wisconsin, this 26th day of June 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman