

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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ROBERT McLAREN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0136

Case Type: PA

DECISION NO. 40228

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Appearances:

Robert McLaren, 1321 Rahr Avenue, Oshkosh, Wisconsin, appearing on his own behalf.

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 Health Services.

**DECISION AND ORDER**

On September 8, 2023, Robert McLaren filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Health Services (DHS). The appeal was assigned to Commission Examiner Anfin Jaw.

A telephone hearing was held on November 10 and 15, 2023, by Examiner Jaw. The parties made oral argument at the conclusion of the hearing. On November 15, the record was closed upon receipt of an exhibit. On December 7, 2023, Examiner Jaw issued a Proposed Decision and Order modifying the discharge of McLaren by DHS to reinstatement without backpay, a demotion to the position of Psychiatric Care Technician-Advanced, and a five-day suspension. The DHS filed objections to the Proposed Decision on December 12, 2023, and McLaren filed a response on December 16, 2023.

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

**FINDINGS OF FACT**

1. Robert McLaren (McLaren) was employed by the State of Wisconsin Department of Health Services (DHS), as a Psychiatric Care Supervisor at Winnebago Mental Health Institute (WMHI) and had permanent status in class when he was discharged.

2. The DHS is a state agency responsible for the operation of WMHI, a behavioral health service provider located in Winnebago, Wisconsin.

3. On March 3, 2023, McLaren negligently complied with the nurse-in-charge's directive to remove all of a minor female patient's clothing, including her bra and undergarments, resulting in an unauthorized strip search.

4. The nurse-in-charge admitted to being responsible for the unauthorized strip search but was not in the room during the incident. McLaren assumed a lead role in the unauthorized strip search.

5. As a Psychiatric Care Supervisor, McLaren failed to exercise sound independent judgement and decision-making.

6. McLaren failed to ensure the patient's rights were protected.

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 Health Services did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Robert McLaren but did have just cause to suspend and demote him.

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

### **ORDER**

The discharge of Robert McLaren by the State of Wisconsin Department of Health Services is modified to reinstatement without backpay and a demotion to the position of Psychiatric Care Technician-Advanced.<sup>1</sup>

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<sup>1</sup> When the discipline imposed is modified pursuant to the Commission's authority under Sec. 227.44(4)(c), Stats., the Commission is not bound to follow any disciplinary progression established by the employing agency. See *Wolf v. DOC*, Dec. No. 36317 (WERC, 5/16); *Waterman v. DOC*, Dec. No. 36741 (WERC, 12/16); *Kaufert v. DOC*, Dec. No. 37989 (WERC, 9/19). Rather, when exercising its Sec. 230.44(1)(c), Stats. just cause jurisdiction, the Commission has discretion to determine the appropriate level of discipline.

Issued at Madison, Wisconsin, this 22<sup>nd</sup> day of December 2023.

**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.

Robert McLaren 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 McLaren 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).

McLaren began his career in State service in August 2006. He was a Psychiatric Care Supervisor (PCS) at Winnebago Mental Health Institute (WMHI) since 2018. Prior to being promoted, he was a Psychiatric Care Technician (PCT) at the Wisconsin Resource Center and later at WMHI. As a PCS, he held a certified nurse aide (CNA) license and worked under the general supervision of a Nurse Supervisor, in collaboration with Nurse Managers, the Assistant Director of Nursing and the Director of Nursing. In conjunction with the registered professional nurse, McLaren was responsible for assisting in the operations of assigned units, the supervision of the implementation of care and treatment plans, therapeutic activities for patients, as well as nursing care as directed by licensed practitioners. McLaren also provided supervision of assigned PCTs.

On March 3, 2023, McLaren was informed by the RN on duty, who was the nurse-in-charge, that a minor female patient was verbally refusing to comply in the Manikin process. Manikins are completed at the time of admission and/or when deemed necessary by medical staff. The Manikin process utilizes a systematic approach to inspect the patient's body while providing privacy and dignity for the patient. All clothing, except for undergarments, are removed. Because a Manikin is required during the admission process, McLaren explained the procedure to the patient and tried to gain her compliance. After many hours, the nurse-in-charge directed McLaren to remove all of the patient's clothing, including her bra and undergarments. McLaren complied with his supervisor's directive.

After the incident and a patient complaint, the Department initiated an investigation and found that there was a violation of the Manikin process. By removing the patient's bra and undergarments, staff had completed an unauthorized strip search. During the investigation, the RN

in charge admitted that she was responsible for the Manikin process, however, was not in the room during the incident. She had directed McLaren to remove the patient's clothing, including her bra and undergarments. McLaren had then assumed a lead role in the Manikin turned unauthorized strip search. The Department terminated the RN in charge for violations of work rules and policies, including negligently directing McLaren to remove all of the patient's clothing, including her bra and undergarments. Another nurse involved in the incident resigned under investigation.

The Department asserts that McLaren was equally responsible as the RN for the failure to follow the Manikin process, as well as his failure to ensure the protection of the patient's dignity and rights. As a supervisor, and a veteran employee, it was his responsibility to not only know policy and procedure, but also to ensure that policies and procedures are followed. He was negligent by not recognizing the difference between a Manikin and a strip search. Additionally, McLaren was a Crisis Prevention Management (CPM) instructor at the time, and thus he was relied upon to teach staff intervention management in a way that protects and promotes patients' rights. The other staff involved in the incident that day followed his lead. Despite having no prior discipline on his record, the Department determined that based on the egregiousness of the incident, termination was warranted.

As a Psychiatric Care Supervisor, despite the fact that he was following a supervisor's order, McLaren is faulted for failing to exercise sound independent judgment and decision-making. Therefore, the Commission concludes that McLaren committed serious misconduct when he complied with the nurse-in-charge's directive. Accordingly, the Commission finds that DHS had just cause to discipline McLaren for that serious misconduct.

McLaren's serious misconduct warrants serious discipline, but the Commission concludes that discharge is not warranted under the just cause standard. While he failed to take the opportunity to determine if the RN's order fell within one of limited exceptions that would allow removal of undergarments,<sup>2</sup> he is nonetheless less culpable than the RN as he was a subordinate following a supervisor's order. In addition, he has 17 years of discipline-free State service. Therefore, the Commission concludes that the combination of the very lengthy suspension created by reinstatement without back pay and a demotion reflecting McLaren's supervisory failures as to those whose work he directed that day is the appropriate just cause discipline. Thus, McLaren is reinstated without backpay and demoted to a Psychiatric Care Technician-Advanced.

Issued at the City of Madison, Wisconsin, this 22<sup>nd</sup> day of December 2023.

## **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

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<sup>2</sup>While it is not permissible to remove a patient's undergarments in a standard Manikin procedure, there may be circumstances of medical necessity or under providers' orders where removal of all undergarments is necessary. Therefore, McLaren's reliance upon the directive given by the RN in charge was not out of the range of permissive usage of the Manikin procedure in all circumstances.