

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AUSTIN WEIDNER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0600

Case Type: PA

DECISION NO. 40230

Appearances:

Allyson M. Carstensen, W6710 County Road CC, Tomahawk, Wisconsin, appearing on behalf of Austin Weidner.

David G. Makovec, Attorney, Department of Administration, 201 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 September 19, 2023, Austin Weidner filed an appeal with Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause by the State of Wisconsin Department of Corrections (DOC). The appeal was assigned to Commission Examiner Anfin Jaw.

A telephone hearing was held on November 8 and 17, 2023, by Examiner Jaw. The parties made oral argument at the conclusion of the hearing. On December 12, 2023, Examiner Jaw issued a Proposed Decision and Order affirming the one-day suspension of Weidner by the DOC. On December 13, 2023, Weidner filed objections to the Proposed Decision. The DOC did not file a response by the deadline given of December 18, 2023.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. Austin Weidner is employed by the State of Wisconsin Department of Corrections (DOC) as a Youth Counselor-Advanced at Lincoln Hills/Copper Lake Schools (LHS/CPS) and had permanent status in class at the time of his one-day suspension.

2. The DOC is a state agency responsible for the operation of various corrections facilities including LHS/CLS, juvenile facilities located in Irma, Wisconsin.

3. On January 27, 2023, Weidner's supervisor, as well as the Superintendent of LHS/CLS, gave Weidner a directive to attend mandatory training scheduled on January 30, 2023.

4. On January 30, Weidner failed to comply with the directive when he did not show up to the mandatory training session.

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 § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Corrections had just cause, within the meaning of §230.34(1)(a), Stats., to suspend Austin Weidner for one day.

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

ORDER

The one-day suspension of Austin Weidner by the State of Wisconsin Department of Corrections is affirmed.

Issued at the City of Madison, Wisconsin, this 28th day of December 2023.

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.

Austin Weidner 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 Weidner 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).

The facts are largely not in dispute. On January 27, 2023, Weidner's supervisor, Captain Kyle Hoff, gave Weidner a supervisory directive to attend mandatory training on January 30, 2023, scheduled for 8:00 AM–4:30 PM. After Weidner declined to attend the training and questioned the Department's authority to require him to attend the training, LHS/CLS Superintendent Klint Trevino, emailed Weidner stating, the "expectation is that you attend as instructed."

On January 30, Weidner failed to attend the scheduled mandatory training and did not contact anyone that morning indicating that he would be absent. The Department, per protocol, made multiple attempts by phone to contact Weidner, due to his absence. Weidner did not answer, and the Department left a voicemail to contact the facility to ensure that he was ok. The Department also contacted Weidner's emergency contact and left a voicemail to contact the facility to ensure the wellness of Weidner. After several hours, the Department contacted the Lincoln County Sheriff's Department to complete a wellness check on Weidner. A Lincoln County Deputy was able to make contact with Weidner at his residence. Weidner was fine and had simply refused to attend the training that day.

In *Reesman v. DOC*, the Commission stated, "[w]hen a supervisor gives an employee a legitimate order or directive, the employee is supposed to comply with the order or directive and do what they are told whether they like it or not. Employers have a legitimate interest in ensuring that employees follow the directives they are given. When employees fail to follow orders or directives, that conduct is obviously detrimental to the workplace environment. If an employee does not comply with a work order or directive, then their conduct constitutes insubordination, and

there can be adverse employment consequences as a result.” See *Reesman v. DOC*, Dec. No. 37301 (WERC, 02/18).

Here, Weidner argues that Captain Hoff and Superintendent Trevino’s order was unlawful and a violation of the Department’s overtime or Additional Hours of Work Policy. Weidner claims that requiring staff to attend mandatory training outside their regularly scheduled work hours is against the policy and procedure for authorizing and scheduling additional hours of work. That is the reason he “declined” the overtime hours for the training.

The DOC contends that its Additional Hours of Work Policy is the policy and procedure for filling overtime shifts to run the facility and does not cover ordering overtime for mandatory training. The policy only addresses unscheduled and scheduled overtime for fair distribution of filling shift vacancies. The Department’s Employee Development and Training Policy also does not address overtime for mandatory training. However, even if the Additional Hours of Work Policy does apply, Division Administrator Ronald Hermes approved an exemption to accommodate the facility needs for staff training. While the Commission acknowledges Weidner’s frustration in having to attend training outside his regularly scheduled hours of work, we find that Hoff and Trevino’s directive to Weidner to attend the scheduled training was a lawful and legitimate work directive that they were empowered to make, and that Weidner was required to comply with. Additionally, we conclude that the Department has the authority to require employees to attend mandatory training, even if the training is scheduled on a day outside their regularly scheduled hours of work. Under the circumstances, because Weidner failed to comply with the legitimate work directive, misconduct has been established.

Nevertheless, Weidner asserts that his discipline should be rejected due to the allegation of disparate treatment in comparison to other discipline that have been issued at LHS/CLS. 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, and (b) for similar conduct. See *Morris v. DOC*, Decision No. 35682-A (WERC, 07/15). Weidner provided one example where a non-disciplinary Letter of Expectation (LOE) was issued by DOC in March 2021 to M.K., a Supervising Youth Counselor II, when he failed to call in and notify supervisory staff properly of an absence. While slightly similar, M.K.’s misconduct was a straight attendance violation. Weidner’s misconduct was not a simple no call/no show or call-in violation; it clearly involved insubordination and a refusal to comply with a supervisory work directive, in addition to the no call/no show. Thus, MK.’s misconduct is not similar to Weidner’s misconduct and M.K.’s LOE does not satisfy the disparate treatment test.

Given the foregoing, the Commission finds that Weidner’s insubordination and failure to comply with a legitimate work directive to attend mandatory training provides just cause for the one-day suspension imposed by DOC. As the first step in the disciplinary progression schedule, a one-day suspension was not excessive punishment, and it is therefore affirmed.

Issued at the City of Madison, Wisconsin, this 28th day of December 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman