

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PHYLLIS A. LARSON, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 55
No. 71638
PA(adv)-222

Decision No. 33897-B

Appearances:

Joe Everingham, Representative, 317 Knutson Drive, Madison, Wisconsin, 53704, with **Maggie Merdler**, Field Representative, Wisconsin State Employees Union, 8033 Excelsior Drive, Madison, Wisconsin, 53717-1903 on the brief, for the Appellant.

Michael Soehner, Labor Relations Specialist – Chief, Office of State Employment Relations, 101 East Wilson Street, Madison, Wisconsin 53707-7855, for the Respondent.

DECISION AND ORDER

Phyllis A. Larson appeals the imposition of a disciplinary one-day suspension from her employment with the Wisconsin Department of Health Services for allegedly falsely reporting that she found foreign material in an automated medication dispenser at the Central Wisconsin Center. The parties agreed to the following statement of the issue:

Whether there was just cause for the suspension of Phyllis A. Larson that the Department of Health Services imposed by letter of February 6, 2012.

The matter was heard on October 9, 2012, before Hearing Examiner Stuart D. Levitan of the Commission's staff. The parties submitted written arguments by December 4, 2012. The Examiner issued a Provisional Proposed Decision and Order on January 28, 2013 concluding there was not just cause for the suspension, and informed the Appellant of the statutory period for submitting any request for fees and/or costs under Sec. 227.485, Stats. The Appellant did not request fees and/or costs.

No. 33897-B

On March 1, 2013, the Examiner issued a Proposed Decision and Order and advised the parties that objections to the Proposed Decision and Order should be filed on or before April 1, 2013. No objections were filed.

The Commission hereby makes and issues the following

FINDINGS OF FACT¹

1. Respondent Department of Health Services (DHS) is a state agency responsible for a variety of health-related services, including long-term care. Among the enterprises included in the DHS Division of Long Term Care is the Central Wisconsin Center for the Developmentally Disabled (CWC), whose Director is Janice Holling. Stephen L. Davis, RPh, is the Pharmacist Supervisor at CWC.

2. Phyllis A. Larson, the Appellant, is a full-time Pharmacy Technician with permanent status in class, employed at the CWC. She is one of four pharmacists and four pharmacy technicians whom Davis supervises.

3. One of the pieces of equipment utilized by pharmacy personnel at CWC is an automated machine used for dispensing pharmaceuticals. The machine is identified as an AutoMed Dispenser.

4. Supervision had discussed with staff the problem of foreign materials such as cotton and foil being found in the Automated Dispenser and the importance of preventing such occurrences.

5. On January 6, 2012, Appellant reported finding a desiccant canister (used to absorb moisture) in the AutoMed Dispenser.

6. On January 9, 2012, Appellant reported she found a desiccant packet in the AutoMed Dispenser that was being used to dispense Celebrex.

7. Following Appellant's reports, Davis began an investigation. Prior to Appellant's reports, no employee had ever reported finding a desiccant packet or canister in an AutoMed Dispenser.

8. Davis examined an unopened Celebrex container and determined that it did not contain a desiccant. By contact with Pfizer, Inc., the drug manufacturer, he confirmed that Celebrex was not packaged for sale in North America with a desiccant.

9. As part of his investigation Davis also interviewed Appellant and the three other pharmacy technicians.

¹ These Findings are consistent with but more concise than the Findings in the Proposed decision.

10. Davis concluded that Appellant had concocted the story of finding the desiccant package in the Celebrex Automatic Medication Dispenser.

11. On February 12, 2012, Davis imposed a one-day disciplinary suspension on Appellant for falsely reporting the desiccant packet in the Celebrex dispenser.

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

CONCLUSIONS OF LAW

1. The Commission has the authority to review this matter pursuant to Sec. 230.44(1)(c), Stats.

2. Respondent Department of Health Services has sustained its burden to establish just cause to suspend Appellant Phyllis A. Larson.

3. There was just cause for the Respondent Department of Health Services to suspend Appellant Phyllis A. Larson.

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

ORDER²

The Respondent's decision to suspend Appellant is sustained.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of July, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

² Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

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MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter is before the Commission as an appeal of the imposition of a one-day suspension on Appellant Phyllis A. Larson for allegedly making a false report of finding a foreign object (a desiccant package) in an automated medication dispenser.³

The Commission applies a three-step analysis when reviewing an agency's decision to impose discipline: Did the employee engage in the alleged misconduct? If so, did it warrant some form of discipline? If so, was the discipline excessive? When answering the final question, the Commission must consider the nature of the misconduct; whether it impaired or tended to impair the agency's operations; the degree of any impairment, and the employee's prior work record. The agency bears the burden of proof, and must show by a preponderance of credible evidence that it satisfied all steps of the analysis. See, Del Frate v. DOC, Dec. No. 30795 (WERC, 2/2004).

Based upon Pharmacist Supervisor Davis' review and investigation, he concluded that there were only four likely explanations for the presence of the desiccant in the machine dispensing the Celebrex. They were:

- (a) The desiccant package was already in the dispenser;
- (b) The desiccant package was left on the sorting table and accidentally loaded into the canister;
- (c) The desiccant was deliberately loaded into the canister;
- (d) The Appellant fabricated the story.

Davis ruled out (a) based upon his knowledge that Celebrex did not include a desiccant. He ruled out (b) as highly unlikely because it would have been a difficult mistake to make; and (c) because he had no reason to believe someone would sabotage the machine.

As part of his investigation Davis concluded that each of the technicians he interviewed appeared credible and believable save for Appellant who did not "maintain eye contact" and looked "down and away" during her interview.

After ruling out all possible alternative explanations for the presence of a desiccant package in the equipment, Davis exercised his judgment to conclude that the report was false.

³ As noted above, Respondent's letter explicitly based the suspension on Appellant's report of January 9, 2012, and made no mention of her similar report on January 6, 2012.

His subsequent interviews and credibility determinations confirmed his belief that Appellant fabricated the story.⁴ Given the obvious need for precision and mutual trust in a pharmacy, a false report of finding a desiccant in a medication dispenser would certainly tend to impair the employer's operation; we do not find a one-day suspension for doing so to be excessive.

Dated at Madison, Wisconsin, this 23rd day of July, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

⁴ Our analysis does not hinge on the hearsay issues addressed in the Proposed decision and thus it is unnecessary to discuss said issues here. Suffice it to say that we are satisfied that our analysis is consistent with Gehin v. Wisconsin Group Ins. Bd., 278 Wis. 2d 111, 692 N.W. 2d 572 (2005).