

FILED  
02-11-2020  
Clerk of Courts  
Oconto County WI  
2019CV000021

BY THE COURT:

DATE SIGNED: February 11, 2020

Electronically signed by Jay N. Conley Oconto Circuit Judge Branch II  
Circuit Court Judge

STATE OF WISCONSIN                      CIRCUIT COURT                      OCONTO COUNTY

ANDREW DRYJA,  
Petitioner,

MEMORANDUM DECISION

vs.

Case No. 19 CV 21  
[RE: WERC Dec. No. 37793]

WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION,  
and WISCONSIN DEPARTMENT OF NATURAL RESOURCES,  
Respondents.

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Petitioner petitions for judicial review and reversal of a Decision of the Wisconsin Employment Relations Commission dated January 17, 2019. Respondents, the Commission and the Wisconsin Department of Natural Resources, have requested that the Decision be affirmed.

This Court holds that the State of Wisconsin Department of Natural Resources did not have just cause within the meaning of Sec. 230.34(1)(a) Wis. Stats. to discharge Petitioner. Petitioner is, consequently, a prevailing party within the meaning of Sec. 227.485(3) Wis. Stats. The Decision of the Commission is reversed and the case is remanded to the agency for further action to determine appropriate discipline for Petitioner other than discharge. Petitioner's Motion for Costs pursuant to Sec. 227.485(3) Wis. Stats is granted.

The issues here are:

Whether there is substantial evidence to show:

1. Petitioner is chargeable with the conduct complained of

and

2. Whether such conduct, if true, constitutes just cause for discharge.

The Court, for the sake of argument, will presume that the answer to the first question is “yes”. The Court holds that the answer to the second question is “no”.

The question on judicial review is whether there is substantial evidence to support the Decision of the Commission here, see *Reinke v. Personnel Board*, 53 Wis. 2d 123 (1971). The substantial evidence test is explained in *Kitten vs. DWD*, 2002 WI 54 as, if reasonable minds could arrive at the same conclusion as the agency, the agency should be upheld. The Court does not have to defer to the agency’s conclusions of law, see *Tetra Tech EC Inc. v. Wis. Dept. of Revenue*, 2018 WI 75. The Court does have to give “due weight” to the agency involved, here the Department of Natural Resources (DNR), under Sec. 227.57(10) Wis. Stats.

The Court here does not give a lot of weight to the expertise of the DNR regarding rules, policies, and procedures because Ms. Passno, Supervisor Harrenstein, and Ms. Higgins did not demonstrate such expertise in testimony. They were unfamiliar with important policies relevant to this case. The Court agrees that a reasonable person could accept the Commission’s Findings of Fact. The Court does not concur with the Commission’s Conclusions of Law.

The Court will now discuss the three claimed violations that, if true, could constitute grounds for discharge without progressive discipline pursuant to Sec. 230.34(1)(a) 5. and 8. Wis. Stats.

#### I. NOT REPORTING OVERTIME

For the sake of argument, the Court presumes there is substantial evidence to support the Commission’s finding that Petitioner did not report overtime hours he worked. The larger question is whether this is a violation of any kind. A cursory review of Exhibits

A10 and A11 reveal that overtime is to be used only after adjusting time schedules and insuring that a forty hour week was worked first. Things like equipment maintenance, such as gas stops, are supposed to be done on a normal schedule. It appears that Petitioner's acknowledged desire to avoid overtime due to his family court situation and the DNR's policies are in harmony. The DNR discourages overtime in many situations. In other words, if the Warden is adjusting time, as he or she is supposed to do, then not reporting overtime is the right thing to do.

In this case, the Commission concluded that Petitioner's alleged failure to report constituted falsifying records. *Reinke*, supra, notes that the substantial evidence test requires that the employee actually did these things and it is not sufficient to, simply, believe the employee is guilty. Respondents may believe that Petitioner falsified records here but there is not substantial evidence that he did falsify records. For starters, no time sheets prepared by Petitioner have been introduced that the DNR claims were falsified. One is supposed to presume such records exist because Petitioner did not report overtime. Again, there are many valid reasons not to report overtime. Secondly, the record is uncontroverted that donating time has, at least historically, been practiced in the DNR. In this laborious record, the Court could find nothing prohibiting the practice. Arguably, the policies advanced in A10 and A11 would support it.

The most important consideration, however, is that falsifying records is intentional misconduct and there is not substantial evidence to support this conclusion. In fact, the evidence is to the contrary. Petitioner turned in weekly time sheets to the agency in which he represented many times "flex time to avoid unnecessary overtime use per scheduling agreement.", see page 219 of the November 12, 2018 Transcript. From pages 219-222 of the Transcript, Petitioner, also, testified he turned in monthly vehicle logs signed by supervisors and was asked to donate time. The DNR has refused to produce the Petitioner's time sheets

(page 219 of November 12, 2018 Transcript). There is no substantial evidence constituting just cause for discharge on these grounds.

## II. TRANSPORTING CHILDREN

There is substantial evidence to support the Commission's finding that Petitioner transported his children in a State vehicle on multiple occasions in violation of State policy. Petitioner may have been able to do this had he received permission from his supervisor, since there are provisions allowing this conduct with permission (See Exhibit R-8). The Court disagrees with Petitioner's position that permission is not required. Exhibit R-8, the Incidental Use policy, makes clear that the supervisor's prior authorization is required at II. Policy.

The Court holds that there is no substantial evidence constituting just cause for discharge on these grounds. No one has been terminated on these grounds alone, see Petitioner's witness, Henry Bauman's testimony commencing at page 179 of the November 12, 2018 Transcript. See, also, footnote 5 on page 9 of the Commission's brief. Discharging Petitioner on these grounds would be disparate treatment. The only person terminated on these grounds (based on the record before the Court) was DNR employee Horzewski who was terminated on other grounds, as well, including felony theft!

## III. STORING ITEMS

The Court, again, for the sake of argument, presumes there is substantial evidence to support the Commission's finding that Petitioner stored personal items at a State facility without permission. The Court struggles with this because it, certainly, can be argued that acquiescence is a form of permission, and some of the stored items were there since 2006!

The Court holds that there is no substantial evidence constituting just cause for discharge on these grounds. In my judgment, this was the weakest ground used to terminate Petitioner. For starters, some of this property benefited the DNR, so it is a stretch

to find misuse or abuse of agency property. Some of the property (tires come to mind) did not benefit the DNR. And, although there appears to have been acquiescence, nobody told Petitioner he could store property there. The biggest problem is again that this is disparate treatment. Footnote 5 on page 9 of the Commission's brief indicates four employees that "testified that they stored personal property at a DNR station." The Court is unaware of anyone terminated for this conduct alone based on the record.

#### IV. MISCELLANEOUS

The Court has not addressed the litany of other complaints the DNR made against Petitioner because it was not necessary to the Decision. This Court addressed the three key Findings of Fact the Commission used to justify their Decision to uphold the discharge of Petitioner without progressive discipline. It is undisputed that the DNR did not utilize progressive discipline in these proceedings.

Petitioner's attorney should draft an Order in conformity with this Decision.