

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATTHEW KACZMAREK, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0330

Case Type: PA

DECISION NO. 38418

Appearances:

Sean P. Daley, AFSCME Wisconsin Council 32, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of Matthew Kaczmarek.

Cara J. Larson, 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 December 17, 2019, Matthew Kaczmarek filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for five days without just cause by the State of Wisconsin Department of Corrections.

A telephonic hearing before Examiner Peter G. Davis was held on February 13, 2020. The parties made oral argument at the conclusion of the hearing and thereafter filed supplemental evidence and argument through March 17, 2020.

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

FINDINGS OF FACT

1. At the time of his November 18, 2019 five-day suspension, Matthew Kaczmarek was employed as a Correctional Sergeant by the State of Wisconsin Department of Corrections and had permanent status in class.
2. Kaczmarek was tardy for work on October 22, 2019 for the sixth time during 2019.

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 did have just cause, within the meaning of § 230.34(1)(a), Stats., to suspend Matthew Kaczmarek for five days.

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

ORDER

The suspension of Matthew Kaczmarek is affirmed.

Issued at the City of Madison, Wisconsin, this 30th day of March, 2020.

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.

Kaczmarek 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 Kaczmarek 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).

It is undisputed that Kaczmarek was tardy for the sixth time in 2019. Thus, misconduct has been established. Under the terms of Executive Directive #2, a five-day suspension is the specified discipline for the sixth tardy and such a disciplinary response does not offend a just cause standard.

However, Kaczmarek nonetheless asserts just cause is lacking because DOC allegedly allows probationary employees to engage in the same conduct without disciplinary consequences and/or fails to immediately discharge probationary employees for their first rule violation as allegedly required by Wisconsin Handbook Chapter 410 and/or has not been consistent in its application of discipline as to others employees with civil service protections.

As to the DOC treatment of probationary employees who lack civil service protections, the Commission doubts there is any just cause relevancy regarding the treatment of employees with civil service protections. The two groups are not “similarly situated” for the purposes of a disparate treatment analysis because different legal standards apply to each group. To the extent there is relevancy, Kaczmarek’s claims of differing treatment have not been definitively established. Furthermore, assuming for the sake of argument that there is relevancy to Kaczmarek’s contention that Chapter 410 requires that probationary employees be discharged for their first offense, the Commission concludes otherwise. The language in question is most reasonably understood to apply to serious misconduct-not to a run of the mill episode of tardiness or absenteeism. Lastly, Kaczmarek’s assertion of disparate treatment vis-à-vis other DOC employees with civil service protections has not been proven.

The litigation of this appeal has provided clarity as to the manner in which DOC asserts it administers a disciplinary progression as to matters of tardiness and absenteeism. Any proven deviation from those assertions will obviously be relevant in future appeals.

Issued at the City of Madison, Wisconsin, this 30th day of March, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman